88-1350

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

JUDY GROVE SOWERS

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

A. Whether the due process clause of the Fourteenth Amendment places on school districts or its administrators a constitutional duty to protect students from a criminal assault by a teacher, committed during summer vacation when the student was voluntarily present in the teacher's home, where the district has no knowledge of the criminal activity or the fact that any particular individual is at risk. The Court below answered in the *affirmative.*

B. Whether any such duty was clearly established as a matter of law in 1979 when the Petitioners acted in this case. The Court below answered in the *affirmative.*

C. Whether the imposition of this duty places school districts and their administrators in the position of guarantors of a student's safety, even when the student is not attending school or a school sanctioned activity. The Court below did not address this question.

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IV. OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Third Circuit is printed in the Appendix hereto, page 1. The Opinion and Order of the United States District Court for the Western District of Pennsylvania is reported at 694 F.Supp. 1088 (1988) and 1988 U.S. Dist. LEXIS 9613, and is printed in the Appendix hereto, pp. 9-46.

V. STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254.

The Opinion and Order of the United States Court of Appeals for the Third Circuit was entered on January 31, 1989. App., page 1.

Jurisdiction for the appeal to the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. § 1291. The appeal to the United States Court of Appeals for the Third Circuit was made in accord with *Mitchell vs Forsyth*, 472 U.S. 511 (1985), which holds that a denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. § 1291.

Jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked by Plaintiff based upon 28 U.S.C. § 1983.

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are the constitutional provisions and statutes involved in this appeal:

A. Constitutional Provisions

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States under the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14, Section 1.

B. Federal Statutes

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit and equity, or other proper proceeding for regress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983

C. State Statutes

Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

24 Pa.C.S.A. § 13-1317.

VII. STATEMENT OF CASE

This is an appeal of an Order of the United States Court of Appeals for the Third Circuit, Case No. 88-3640, affirming the Order of the United States District Court for the Western District of Pennsylvania, Case No. 88-57 Erie, which denied the Motion of Petitioners Frederick Smith, Richard Miller and Frederick Shuey to Dismiss on the grounds that they are immune from suit on the allegations of this case. This action commenced with the filing of a Complaint by Plaintiff-Respondent, Judy Grove Sowers ("Respondent" or "Sowers"), in the United States District Court for the Western District of Pennsylvania, Erie Division, on February 17, 1988. Complaint, App., p. 45.

The facts material to the consideration of the questions presented are as follows. The Bradford Area School District (the "School District"), which is not a party to this appeal, is a local governmental agency organized pursuant to the laws of the Commonwealth of Pennsylvania. During the relevant period of time, Petitioner, Frederick Smith ("Smith"), was the principal of the Bradford Area High School; Petitioner Richard Miller ("Miller"), was the assistant principal; and Petitioner Frederick Shuey ("Shuey"), was the superintendent of the School District.

Respondent Judy Grove Sowers ("Sowers") attended the Bradford Area High School, graduating in 1980.

The record before the District Court and the Court and the Court below reveals the following:

Sowers contends in her Complaint that in June of 1979 the former band director of the Bradford Area High School, Edward Wright, sexually assaulted her. Complaint, par. 12, App., p. 51. Although she omits these material facts from her Complaint, she has testified in a deposition taken in a related case that, during her summer school vacation and after becoming intoxicated at her sister's wedding reception, she visited Wright's private home, where this assault allegedly occurred. App., pp. 69 *et seq.*.[1] This is the only incident of sexual assault of which Sowers complains. No incident occurred while Sowers attended school or a school sponsored activity.

On April 12, 1988, Petitioners filed a Motion To Dismiss, contending *inter alia* that:

> 1.) Respondent's claims were barred by the applicable statute of limitations;
>
> 2.) The School District had no constitutional duty to protect her for this incident, which happened during summer vacation when she was voluntarily present in the teacher's home;

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[1] This deposition was originally a part of the record in the related case of *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *petition for certiorari pending* at No. 88-802 in this Court. It was also submitted to and considered by the District Court in this case, which referred to the deposition in its recitation of facts. District Court Opinion, App. at 12. Smith, Miller and Shuey have reproduced the relevant pages of this deposition in the interest of judicial economy since, although Sowers' own Complaint does not recite these facts, her counsel have not attempted to deny this sworn testimony in the prior cases.

3.) Respondent alleged no actionable violation of her civil rights; and

4.) Petitioners Smith, Miller, and Shuey were shielded from liability by the defense of qualified immunity.

The District Court issued its Opinion and Order on August 29, 1988. The District Court held, *inter alia*, that there were genuine issues of material fact pertaining to the statute of limitations; that Respondent had alleged a violation of a right protected by the substantive component of the due process clause; and that Petitioners Smith, Miller, and Shuey were not shielded from liability by the defense of qualified immunity.

Petitioners filed their Notice of Appeal on September 26, 1988, from the District Court's Order as it relates to the issue of qualified immunity.[2]

The United States Court of Appeals for the Third Circuit issued its judgment order, without an opinion, denying Petitioners appeal on January 31, 1989. Judgment Order, App., p. 1. The Court found that the disposition of this case was "essentially controll[ed]" by the decision of a divided panel of the Court in the case of *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *petition for certiorari pending* at No. 88-802 in this Court.

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[2] A denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. § 1291. *Mitchell vs Forsyth, supra.*, 472 U.S. 511.

VIII. ARGUMENT

A. Summary of argument

The Third Circuit's ruling in this case marks an additional expansion of civil liability under § 1983, extending liability even further than in its erroneous decision in *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *petition for certiorari pending* at No. 88-802 in this Court. By affirming the judgment of the District Court, the Third Circuit, in this case, goes far beyond previous law, contradicting not only its own prior rulings but those of this and other Courts as well. On the facts of this case, the Court's ruling has the practical effect of making school districts, under the guise of § 1983, virtual insurers of the safety of students whenever and wherever they may come in contact with a school employee.

It must be remembered that the Courts below were faced only with the narrow issue of whether these school officials were entitled to qualified immunity for actions they took (or allegedly failed to take) in 1979. As discussed in more detail below, governmental officials can be found liable only when they knew or should have known that their conduct violated some "clearly established" constitutional rights of the plaintiff.

Before the District Court could determine whether the alleged right was "clearly established," however, it first had to determine whether such a right exists at all. The

District Court found that a school district does have an affirmative duty, arising out of the Fourteenth Amendment, to protect a high school student on summer vacation from sexual abuse by a teacher which occurs while the student is voluntarily in the teacher's home. The Court then found that this newly-created duty was "clearly established" in 1979 when these officials acted.

This holding, however, must be carefully scrutinized in light of the fact that the District Court relied heavily upon the opinion of the Third Circuit in the case of *Estate of Bailey by Oare vs County of York*, 768 F.2d 503 (3rd Cir. 1985). That opinion is directly contrary to a decision on identical facts by the Seventh Circuit, a decision now under review by this Court. *DeShaney vs Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted* 108 S. Ct. 1218 (1988). Moreover, the District Court's finding of potential liability in this case seems to be directly contrary to this Court's rationale in *Martinez vs California*, 444 U.S. 277 (1980).

Petitioners thus contend that, by affirming the District Court without an opinion, the Circuit Court erred in (a) finding that such a constitutional duty exists in the first instance, and (b) further erred in holding that such a duty was "clearly established" at the time Respondents acted. These errors are so egregious that this Court ought to grant certiorari and examine for itself the far-reaching implications of the holding of the Court below.

The finding of the District Court that a duty exists, guaranteed by the due process clause, to protect persons

at liberty from harm, is an essential part of its more narrow ruling on the sole issue before it (that of qualified immunity). The broad implications of this ruling thus require review by this Court.

B. Stoneking *does not control the outcome of this case*

The Third Circuit, in its Judgment Order in this case, found that its prior opinion in *Stoneking v. Bradford Area School District et al., supra,* was "essentially controlling" in this case, and accordingly affirmed the District Court without opinion. The Third Circuit, however, failed to recognize the many material and dispositive distinctions between *Stoneking* and this case.

There is an old saw, frequently recalled by lawyers, that "hard cases make bad law." If that is true, this corollary is also true: bad law begets worse law. This case is an example of that corollary.

While Petitioners do not concede that *Stoneking* is a "hard case," it is somewhat more troublesome than the case at bar in that it involves a female student allegedly abused over a long period of time by a teacher, on and off of school property, on band trips and on other occasions. But regardless of whether *Stoneking* is a "hard case," the Third Circuit's decision in that case is certainly "bad law" and ought to be reversed, for the reasons set forth in the petition for certiorari in that case now pending in this Court.

The Third Circuit's finding that *Stoneking* "essential-

ly" controls this case has the effect of extending that "bad law" to create potential liability to a much wider range of persons. Unlike *Stoneking*, in this case there is only one alleged contact between Sowers and Wright. This single incident occurred off of school property, during summer vacation when the school officials had no ability to supervise either the teacher or the student. There is furthermore no evidence that the school district had notice of any sort prior to the alleged incident that Wright was a threat to any person. In short, there is simply nothing the school district or its officials could have done to prevent this alleged assault.

The effect of this ruling is that, in the Third Circuit, school officials are now held to a constitutional duty to protect students in situations (*i.e.*, during summer vacation in a private home) where they have no ability to fulfill that duty. This vast expansion of liability is completely contrary to the limited remedial purposes of § 1983, *see Paul v. Davis*, 424 U.S. 693 , at 700-701 (1976), and requires scrutiny and reversal by this Court.

C. Public school officials have no constitutional duty to protect a student from the criminal acts of a teacher, when the student is not in their custody or subject to their control.

It must be noted at the outset that Sowers is not claiming that Smith, Miller and Shuey actually abused her or touched her in any way. Sowers asserts only that she has a right to be free from sexual molestation, and that Smith, Miller and Shuey had a duty to protect her from

this alleged molestation, despite the fact that she was not in the custody or control of these administrators at the time of the incident of which she complains.[3]

The issue of whether governmental officials have a constitutional duty to protect individuals at liberty from criminal acts of third persons is presently before this Court. In *DeShaney vs Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted* 108 S. Ct. 1218 (1988), *pending at* No. 87-154,[4] this Honorable Court has been asked to determine whether a child enjoys a constitutionally-protected right under the Fourteenth Amendment to protection from abusive parents.

The question of the state's duty to protect individuals at liberty from criminal acts of third persons has been a subject of controversy in the Courts of Appeals since this Court's decision in *Martinez vs California*, 444 U.S. 277 (1980). In *Martinez*, a mentally disturbed sex offender was paroled after five years of a one to twenty year term. It was conceded that the parolee was a known risk when he was released. Subsequent to his release he killed a fifteen year old girl. An action was brought under § 1983

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[3] The gravamen of Sowers' Complaint is that she had a right to be free from sexual assault by a teacher of the Bradford Area School District. Of course, for every right there exists a correlative duty; thus, Sowers alleges in essence that the District and Smith, Miller and Shuey had a duty to prevent the alleged assault against her by Wright, even though the assault occured during vacation in Wright's private home.

[4] Argument was conducted before this Court in *DeShaney* on November 2, 1988.

to recover for the loss sustained as a result of the girl's murder. This Court held that the actions of the parolee were too remote to be considered a proximate cause of the parole board's actions in releasing the parolee, and therefore denied plaintiff's cause of action under § 1983. This Court left open, however, the possibility that liability may be found in future cases. *Id.*, 444 U.S. at 285.

Since *Martinez*, the Courts of Appeals have struggled to define the circumstances under which an affirmative duty to protect will be imposed upon government officials. Some Courts have imposed such a duty when they find that a "special relationship" exists between the state and the individual seeking protection.

For example, in *Jensen vs Conrad*, 747 F.2d 185, (4th Cir. 1984), *cert. denied* 470 U.S. 1052 (1984) the estates of six children who died as the result of brutal beatings inflicted by their guardians sued the children's services agencies which had handled their cases. In each case the child involved had been the subject of an investigation by social workers charged under state law with the obligation to investigate cases of child abuse and take steps necessary to prevent similar abuse from occurring. Causes of action were alleged under § 1983 based upon a purported violation of the children's Fourteenth Amendment rights resulting from the failure of the social service agencies and employees to intervene and provide the protection necessary to prevent the harm which occurred.

The United State Court of Appeals for the Fourth Circuit reviewed the case law which had developed nation-

wide on the issue of an affirmative duty arising out of a special relationship to provide protection against deprivation of constitutional rights. The Court identified three factors which it concluded had been persuasive in finding special relationships in the cases reviewed. These include (1) whether the victim or the perpetrator was in legal custody at the time of or prior to the incident; (2) whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and (3) whether the state knew of the victim's particular plight. *Id.*, 747 F.2d at 194-195, n. 11.

Some courts have declined to follow the "special relationship" test, analyzing such cases instead strictly in terms of causation, as this Court did in *Martinez*. For example, the Seventh Circuit has eschewed the notion of a "special relationship" outside of pure custodial relationships such as a prison setting. In *DeShaney, supra* the Seventh Circuit held that a county children's services agency was not liable for serious injuries suffered by a child at the hands of his abusive father even though the agency had received a prior allegation that the child was being abused. That Court held that, while the actions of the county arguably did not help the abused child, they certainly did not harm him or cause his injuries to be more likely to occur, and therefore as a matter of law the county was not liable.[5]

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[5] The Seventh Circuit found that the agency was not liable to the plaintiff, because it was not the cause of the harm. The Court stated

The United States Court of Appeals for the Third Circuit, contrary to the Seventh Circuit, has fully embraced the "special relationship" test outlined by the Fourth Circuit in *Jensen*. In *Estate of Bailey by Oare vs County of York*, 768 F.2d 503 (3rd Cir. 1985), discussing *Jensen*, a divided panel of the Third Circuit suggested that it would be appropriate to find a "special relationship" if the Jensen three-prong test was met. *Estate of Bailey*, 768 F.2d at 509.[6] The Court went on to hold that a county children's services agency could be held accountable under § 1983 for injuries sustained by a minor child at the hand of an abusive parent.

The opinion of the Third Circuit in this case extends the boundaries of this "special relationship" concept even farther. As discussed in more detail at pp. 16-19 below,

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> It is unlikely that [the social worker's] well intentioned but ineffectual intervention did [the infant victim] any good at all, but it is unlikely that she did him any harm. She merely failed to protect him from his bestial father.

DeShaney, *Id.*, p.302. The Court in *DeShaney* refused to adopt the special relationship doctrine as set forth in the Third Circuit's decision of *Estate of Bailey*, *supra*.

[6] The United States Court of Appeals for the Third Circuit recently reaffirmed its approval of the *Jensen* three-step analysis. In *Commonwealth Bank and Trust Co. vs Russell*, 825 F.2d 12 (3rd Cir. 1987), the Third Circuit applied the *Jensen* test without expressly saying so. On page 16, the Third Circuit distinguishes *Commonwealth Bank* from *Estate of Bailey*, *supra*, on the basis that *Commonwealth Bank* case flunks the third prong of the three *Jensen* tests (i.e., whether the state knew of any particular threat to plaintiff's decedents).

the Court below has virtually abolished two of the prongs of the three-part test announced in *Jensen, supra.*

It should be pointed out that the operative facts of *Estate of Bailey* are identical to those of *DeShaney*. Should this Court affirm the Seventh Circuit in *DeShaney*, it will almost of necessity overrule the Third Circuit's holding in *Estate of Bailey*. Since both the District Court and the Third Circuit relied heavily on *Estate of Bailey* in their holdings in this case, an affirmance in *DeShaney* will almost certainly necessitate a reversal in this case.

D. The Third Circuit order expands liability under § 1983 by abolishing the specific notice requirement of the prior "special relationship" test

By affirming the District Court's finding of a "special relationship" in this case, the Third Circuit further expanded liability under § 1983. No other Circuit Court has found that a special relationship can exist unless the public body has prior knowledge of the identity of the victim and the victim's particular plight. This requirement is taken directly from this Court's holding in *Martinez, supra.*[7]

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[7] In *Martinez*, this Court held that the § 1983 claimants failed to state a cause of action against the California parole board, because "the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger." *Martinez, supra.*, 444 U.S. 277 at 286. The circumstances of the incident of which Sowers complains cannot lead to a conclusion other than that Sowers was, in fact, a member of the public at large at the time of the incident.

In its Opinion, the District Court moved well beyond that requirement by finding that public school officials have a constitutional duty to protect a student from the criminal acts of a teacher, committed during summer vacation and on private property, even when there is no notice that a particular, identified student is in peril.

It is uncontroverted that Petitioners had no knowledge of Sowers's particular plight. However, the Third Circuit Opinion would ignore this well accepted requirement, and would deny immunity to defendants. The District Court, in fact, found that the "special relationship" test can be satisfied by a showing that an "identifiable group," rather than a particular individual, is at risk. District Court Opinion, App., p. 22. Thus, instead of accepting as a threshold requirement that public school officials must have particular knowledge of an identifiable student and that student's particular plight, the District Court would establish a duty to protect a broad class of unidentified persons. Petitioners submit that this holding is a significant and unwarranted expansion of liability under 42 U.S.C. § 1983.

More significantly, however, this holding conflicts with this Court's holding in *Martinez, supra.*. Respondent, who was not in any sense of the word in the "custody" of the school district at the time of the alleged assault, falls within the category of "public at large" to whom no special duty is owed under the holding of *Martinez*. 444 U.S. at 286. At the time of the alleged incident, Sowers was not attending school or even a school sponsored activity.

Thus, neither the school district or its administrators selected her out of the public at large and placed her at risk. *See Fox vs Custis*, 712 F.2d 84 (4th Cir. 1983); *Bowers vs DeVito*, 686 F.2d 616 (7th Cir. 1982).

E. The Third Circuit order also abolishes the "custody" requirement of the prior "special relationship" test

This Court and the Circuit Courts have imposed an affirmative duty upon government officials to protect individuals only in very limited circumstances. Generally, an affirmative duty to protect individuals will be imposed only where the state has selected a person from the public at large and placed him in a position of peril. *See, e.g., Estelle vs Gamble*, 429 U.S. 97 (1976), (state officials are under a duty to provide medical care to those held in custody of prison officials); *Youngberg vs Romeo*, 457 U.S. 307 (1982) (caretakers of individuals committed to a mental institution have an affirmative duty to provide that level of care and training necessary to protect the safety of the mentally retarded individual); *cf. White vs Rochford*, 592 F.2d 381 (7th Cir. 1979) (where police officers abandoned minors in car on highway after making a traffic arrest of the adult driver, state placed the minors at peril and was subject to liability under § 1983). This is appropriate since, in those situations, the person in custody is dependent upon the state for his physical well-being. In no instance, however, has this Court or any other Circuit Court imposed a duty upon school districts and its officials

to protect students, who are at liberty.

In the instant case, however, there can be no special relationship, as Sowers was not in the "custody" of school officials at the times of the alleged assaults.[8] While the District Court notes that the *in loco parentis* doctrine, adopted by the Commonwealth of Pennsylvania and codified at 24 Pa.C.S.A. § 13-1317, gives school administrators certain authority over students, District Court Opinion, App. at 24, the Court fails to acknowledge that, at the time of the alleged assault in this case, that section was inapplicable because Sowers was not then in attendance at school or going to or from the school.

F. Petitioners are entitled to qualified immunity

The holding of the District Court in the case at bar is particularly egregious in that, after finding for the first time that this extensive affirmative constitutional duty to protect students exists, it then declares that the Petitioners are not immune from suit. This it can only do if the constitutional rights which were purportedly violated were "clearly established" at the time Petitioners acted. It is respectfully submitted that constitutional rights which are declared for the first time in 1988 were not clearly established in 1979.

This Court established the current standards govern-

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[8] As noted above, the alleged assault in this case took place during summer vacation, while the student was voluntarily present in the teacher's home.

ing qualified immunity in *Harlow vs Fitzgerald*, 457 U.S. 800 (1982).[9] In *Harlow*, this Court stated:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. As this Court determined in *Davis vs Sherer*, 468 U.S. 183 (1984), no other inquiry is relevant.

From the foregoing formulation, the following analysis must be undertaken to determine whether a claim of qualified immunity is properly taken:

1. Is the claim asserted by governmental officials performing discretionary functions?

2. Does Plaintiff have a clearly established statutory or constitutional right which is threatened by the aforementioned exercise of discretion?

3. Should a reasonable person expect that his conduct in exercise of his discretion would violate that right?

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[9] *Harlow* was a suit against federal, not state, officials, but as this Court stated in deciding the case, it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 457 U.S. at 818, n.30 (quoting *Butz vs Economou*, 438 U.S. 478, 504 (1978).

The first step of the analysis outlined above cannot be seriously disputed. Public school officials are certainly governmental officials, and the actions taken by them with respect to investigation of allegations of teacher misconduct, as well as their responses to the results of that investigation, are highly discretionary in nature. Thus, Smith, Miller and Shuey are entitled to assert the defense.

The second prong of this three part analysis is not met. In the instant case, neither the district nor Petitioners owed Sowers any constitutional duty to protect her from assaults by Wright committed at his house during summer vacation. *See* pp. 11-16, above. This means immunity is properly invoked.

Finally, even if the Court could find that such a constitutional duty exists, these officials are still immune since they satisfy the requirements of the third prong; that is, they could not reasonably be expected in 1979 to have known that a constitutional right to such protection would be announced in 1988.

In *Harlow vs Fitzgerald, supra*, this Court expressly declined to set forth the criteria for determining whether a right (and, Petitioners submit, a corresponding duty) is "clearly established". 457 U.S. at 118, n.32. However, the Third Circuit, in *People of Three Mile Island vs Nuclear Regulatory Commissioners*, 747 F.2d 139, 145 (3rd Cir. 1984), adopted an approach that requires officials to apply general, well-developed legal principles. 747 F.2d at 144. This approach requires some -- but not precise -- factual correspondence between applicable legal precedents and

the case at issue. *Id.* at 145. Officials are therefore required to relate established legal principles set forth in previous cases to analogous factual situations. *Id.* at 144, citing *Williams vs Bennett*, 689 F.2d 1370, 1381-82 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). It does not, however, require lay public officials to "predic[t] the future course of constitutional law." *People of Three Mile Island*, 747 F.2d at 144, quoting *Pierson vs Ray*, 386 U.S. 547 (1967).

The question becomes, then, one of identifying legal principles governing analogous factual situations at the time the alleged violation occurred, and, if any existed, whether the official should have related this established law to the situation before them. *Hicks vs Feeney*, 770 F.2d 375, 380 (3rd Cir. 1985). Hence, a review of the law as it existed in 1979 must be undertaken.

The District Court relied on a number of cases in determining whether or not clearly established law imposed a constitutional duty upon Petitioners to protect Sowers. District Court Opinion, App., pp. 29-30. But the cases upon which the Court primarily relied involved procedural due process claims under which high school students were entitled to freedom from arbitrary punishment and disciplinary procedures, or cases involving alleged police misconduct.[10] *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97

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[10] The District Court, in finding a substantive due process right to protection from state intrusions into bodily security, cited a number of cases. *See* District Court Opinion, App. at 29-30, n. 8. Most of the cases cited, however, were decided subsequent to 1979, and cannot therefore stand for

S.Ct. 1401, ___, 51 L.Ed.2d 711, 731-732 (1977) involved only a claim of *procedural* due process involving corporal punishment, again far removed from the substantive duty claimed in this case.

The distinction Smith, Miller and Shuey draw between the corporal punishment cases such as *Ingraham* and this case is not merely semantic. Rather, an examination of *Hall vs Tawney*, 621 F.2d 607 (4th Cir. 1980), relied upon by the District Court, *see* its Opinion at App. p. 32, reveals the critical distinction between the case at bar and a case of allegedly improper corporal punishment. In *Hall*,

---

the proposition that the constitutional duty claimed in this case was "clearly established" in 1979. The few cases decided prior to 1979 include *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, ___, 51 L.Ed.2d 711, 731-732 (1977) (corporal punishment of students by teachers, substantive due process right to personal security); *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (forcible use of stomach pump by police); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police arrest driver of car, abandoning three passenger children); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973) (unprovoked beating of pretrial detainee by guards); and *Jenkins v. Averitt*, 424 F.2d 1228, 1231-32 (4th Cir. 1970) (reckless pistol shooting of suspect by police). All but *Ingraham* involve claims of police misconduct which cannot in any way be likened by these lay administrators to the situation in which they were acting.

The other cases cited by the District Court are equally inapplicable to the proposition that the law was "clearly established" in 1979 that school district administrators had a constitutional duty to investigate whether or not a school teacher was sexually abusing a student. In *Doe vs New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981) and *Doe vs New York City Department of Social Services*, 709 F.2d 782 (2nd Cir. 1983), *cert. denied* 464 U.S. 864 (1983) there is no discussion involving a substantive constitutional right. And, *P.L.C. vs Housing Authority of the County of Warren*, 588 F.Supp. 961 (W.D. Pa. 1984), along with the previous cited authority, was decided subsequent to 1979.

the Fourth Circuit found that recognizing a substantive due process right to be free from "*state intrusions* into realms of personal privacy and bodily security" was appropriate "as a last line of defense against . . . literally outrageous abuses of official power . . ." *Id.* at 613 [emphasis supplied].

In *Hall*, the Court was faced with allegations that a child had been subjected to paddling despite her parents' prior instructions to the school that they did not wish school officials to inflict corporal punishment on their daughter. What was at issue, then, was a *conscious decision* by school officials to inflict corporal punishment on a student. The persons who made that decision were the defendants who were alleged to have abused their "official power" and who actually visited the "intrusion into . . . personal privacy and bodily security . . ."

In the case at bar, however, far from a "literally outrageous abuse of official power," Sowers accuses Smith, Miller and Shuey of not exercising their power sufficiently to prevent harm from being visited upon her from another source. The administrators are not accused of any sexual contact with Sowers; thus they are not the actors who inflicted the actual harm on her.[11] The allegations of her Complaint are thus of an entirely different character than the authority upon which she primarily relies.

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[11] There is no allegation that the sexual contact with Edward Wright was sanctioned, approved or ratified by Smith, Miller and Shuey. Since it was that contact which constitutes the "intrusion," in no way has there been a "state intrusion" as that term is used by the Court in *Hall vs Tawney*.

Indeed, the instant case is a far cry from situations involving a clearly established and well litigated general proposition in which the case at hand merely presents the new factual wrinkle. Petitioners in 1979 had not previously encountered, nor were they aware of any cases, involving situations remotely parallel to the incidents which are the subject of this lawsuit. Whether there existed any constitutional requirement to protect female students from sexual abuse was an open question at all times relevant hereto.

As Justice Stapleton noted in his dissent in *Stoneking v. Bradford Area School District, et al.*, 856 F.2d 594 (3d Cir. 1988), *petition for certiorari pending* at No. 88-802 in this Court,

> Neither this court nor any other federal court of appeals has held, however, that a special relationship exists between a school administrator and students within his or her jurisdiction.
>
> The court's argument for finding a special relationship is quite properly based on analogy. The analogies employed, however, are not sufficiently close to the situation before us to make the court's conclusion "readily apparent" to reasonable school administrators. While school attendance is mandatory, for example, the relationship between a superintendent of a public school district and high school students

within the district is clearly distinguishable from that between a social worker and her five-year old ward or that between a jailer and his incarcerated charge.

Id., App., pp. 26-27.

The holding of the District Court in the instant case has required the public school administrators to "predict the future course of constitutional law", contrary to its own holding in *People of Three Mile Island, supra*, 747 F.2d at 144, quoting *Pierson vs Ray*, 386 U.S. 547 (1967). Indeed, had these public school administrators in this case been able to "predict the future course of constitutional law," they would have concluded that there was in fact *no* constitutional duty to protect students from sexual abuse by teachers.

Before the Court decided the instant appeal, the Pennsylvania Commonwealth Court ruled squarely that no such duty exists. In *Scott vs Willis*, ___ Pa.Commw. ___, 543 A.2d 165 (1988), two students who had been sexually assaulted by a teacher on school property brought suit against the school district and its officials, alleging a violation of their constitutional rights and seeking relief under § 1983. The Pennsylvania Commonwealth Court sustained a demurrer to the § 1983 claim, holding expressly that there was no special relationship between the school district and the plaintiffs, and that therefore there was no constitutional duty to protect those students. *Id.* at 171.

This holding in *Scott vs Willis* is at odds with the

Third Circuit decision and Sowers' claim in the present case. This disparity between the federal and state appellate courts demonstrates that the law regarding the right and corresponding duty that Sowers now claims was owed to her by Petitioners was not clearly established in 1979, and indeed has not been clearly established to the present time. Certainly, if both state and federal appellate courts cannot agree today on whether any constitutional duty exists, the lay public school administrator could not be expected to make any such determination in 1979.[12]

Accordingly, because no clearly established law existed in 1979 upon which Sowers can base her claim, Petitioners are entitled to assert the defense of qualified immunity, and be dismissed as defendants in this case.

G. The Third Circuit's decision places school districts and their administrators in the position of guarantors of a student's safety, even when the student is not attending school or a school sanctioned activity.

It is difficult to hypothesize a case less likely to result in liability than this. If a school district is potentially

---

[12] It should be noted that the relationship between a Pennsylvania public school and its students is created under state law, and that school administrators are bound by state laws and state courts just as much as by federal laws and federal courts. How can it be said that there clearly established law in 1979 created a special relationship and protective duty between public school administrators and their students, when the state courts, on identical facts, have found in 1988 that no such relationship or duty exists?

liable to a female student who, while on summer vacation, leaves a family social function in an intoxicated condition, and then is assaulted while voluntarily visiting the private home of a teacher, then the school district and its administrators are virtual insurers of the safety of all students, regardless of fault, whenever and wherever they may come in contact with a school district employee.

This result is directly contrary to accepted law. It is well established that a municipal government cannot be held liable under § 1983 on a *respondeat superior* theory; *see Monell vs New York City Department of Social Services*, 436 U.S. 658 at 691 (1978); yet even the theory of *respondeat superior* does not reach as far as the Court's holding in this case. What private employer would be held responsible for the criminal activities of its employee, committed in the employee's own home on his own time, when those activities were not in furtherance of any conceivable work of the employer? None.

This Court cannot permit this pronouncement of the law to stand. Petitioners are entitled to the defense of qualified immunity, and must be dismissed as defendants in this case.

IX. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.

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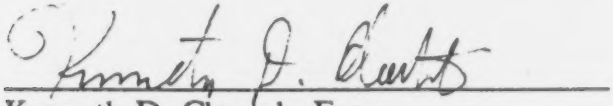
X. CERTIFICATION OF MEMBERSHIP

It is hereby certified that both Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



Kenneth D. Chestek, Esq.

88-1350

Supreme Court, U.S.
FILED
FEB 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

JUDY GROVE SOWERS

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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A. Judgment Order

United States Court of Appeals for the Third Circuit
No. 88-3640
January 31, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3640

JUDY GROVE SOWERS

v.

BRADFORD AREA SCHOOL DISTRICT; FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; **RICHARD MILLER,** in his individual and official capacity as Assistant Principal of the Bradford Area High School; and **FREDERICK SHUEY,** in his individual and official capacity as Superintendent of the Bradford Area School District,

Frederick Smith, Richard Miller and Frederick Shuey,

Appellants

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-00057 E)
District Judge: Honorable Glenn E. Mencer

Submitted under Third Circuit Rule 12 (6)
January 26, 1989

BEFORE: GIBBONS, Chief Judge, and SEITZ and GREENBERG, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the order of the district court of August 29, 1988 be and is hereby affirmed.

The court notes that our jurisdiction is limited to review of the order of the district court insofar as it denied appellants' motion to dismiss on the ground of qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817-18 (1985). Thus, our judgment should not be understood as affirming the order of the district court to the extent that it denied appellants' motions to dismiss on other grounds.

The court enters this order as it believes that *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3d Cir. 1988), *cert.* petition pending, is essentially controlling here.

Costs taxed against appellants.

BY THE COURT,

/s/ Morton I. Greenberg

ATTEST:

/s/ Sally Mrvos, Clerk

January 31, 1989

B. Opinion and Order

United States District Court
for the Western District of Pennsylvania
No. 88-57 Erie
August 29, 1988

694 F.Supp. 125, 1988 U.S.Dist. LEXIS 9613

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

694 F. Supp. 125; 1988 U.S. Dist. LEXIS 9613

JUDY GROVE SOWERS,

Plaintiff,

v.

BRADFORD AREA SCHOOL DISTRICT; FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; **RICHARD MILLER,** in his individual and official capacity as Assistant Principal of the Bradford Area High School; and **FREDERICK SHUEY,** in his individual and official capacity as Superintendent of the Bradford Area School District,

Defendants

Civil Action No. 88-57 Erie

August 29, 1988

GLEN E. MENCER, UNITED STATES DISTRICT JUDGE

OPINION

This is a civil rights action brought under 42 U.S.C. § 1983 [§ 1983] by a former Bradford high school student,

Judy Grove Sowers, against the Bradford Area School District ["school district"], the school district's superintendent, Frederick Shuey, and the high school's principal and assistant principal, Frederick Smith and Richard Miller. This is the third suit filed against these same defendants by former female students. This case centers on a June 16, 1979 sexual assault upon the plaintiff, then a high school student and member of the marching band by the band director, Edward Wright.

Count I of the complaint is against the school district and alleges that there existed a pernicious practice, custom and/or policy, prior and subsequent to the assault by Wright, of reckless indifference to and/or active concealment of instances of known or suspected sexual abuse of students by teachers. It further alleges that this created a climate wherein child abusers, such as Wright, could prey upon female students with impunity. The complaint alleges that the School District's conduct was a proximate cause of a deprivation of the plaintiff's constitutional rights to freedom from sexual abuse and free access to the courts unimpeded by threats, coercion or intimidation, as well as severe mental anguish, embarrassment, humiliation and emotional distress.

Count II alleges that the individual defendants were members of a conspiracy whose purpose was to conceal from the public instances of known and/or suspected sexual abuse of students by various teachers. The alleged overt acts in furtherance of the conspiracy included, *inter alia*, the alleged co-conspirators' failure to respond

appropriately to the complaints of sexual abuse and defendant Smith's keeping of a personal, secret file in his desk drawer at home memorializing many of the complaints against teachers, as well as the explicit or tacit agreement of each of the alleged co-conspirators The alleged proximate results of the conspiracy are the same as those under Count I.

FACTS

At the heart of this suit is the allegation that on June 16, 1979, Sowers,[1] a member of the school marching band, was sexually molested by Edward Wright, the band director.[2] Wright had been hired by the school district in 1976, with responsibility to supervise band activities and provide music lessons to students. Prior to 1976, Wright had been the band director in the Jasper School District, where the complaint alleges he "had attempted to sexually molest and/or harass various female students." Complaint at par. 20. The complaint alleges that the defendants had been on notice of Wright's proclivities with respect to female students prior to the June, 1979 assault, although the complaint does not detail how it was that they had been put on such notice. Complaint at par. 26(c).

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[1] At the time of the assault, the plaintiff's name was Judy Grove. This action is brought under the name Sowers, the plaintiff's married name. We will refer to her by that name as well.

[2] On November 6, 1986, Edward Wright plead guilty to a ten count criminal indictment which included four counts of indecent assault.

Sower's complaint asserts that Wright's assault on her was just one in a series of incidents in which the defendants, although informed by female students of sexual abuse by teachers, took no action except to conceal the problem. The complaint alleges that prior to the June 16, 1979 assault, during the 1977-78 school year, a female senior informed defendants Smith and Miller that a history teacher (and coach of the girls' tennis team) had made improper sexual advances toward her in a classroom. Complaint at par. 26(a). Smith and Miller told her not to tell her parents about the incident, and no disciplinary action was pursued against the faculty member. *Id.* In 1978 and periodically thereafter, Smith, Miller and school district superintendent Shuey were alleged to have received other complaints of sexually abusive language and/or improper sexual advances by a shop teacher. Complaint at par. 26(b). The defendants allegedly pursued no disciplinary action against the shop teacher. *Id.*

Edward Wright's sexual assault on Judy Grove Sower's occurred on June 16, 1979. According to her deposition, she went to Wright's house to obtain a tape of marching music. Sowers was a section leader and had to learn the music for summer band practice. She was going away the next day for two weeks, therefore she had to obtain the tape so she could learn the music prior to the commencement of summer band practice. Sowers Deposition at 16. She reported the assault to Gene Dillard, a youth counselor visiting the school at the invitation of the school administration. Complaint at par. 13.

Dillard informed Smith and Miller, as well as a school guidance counselor, of the sexual abuse and harassment by Wright. He told them he considered her reports to be truthful. *Id.* at par. 14. Soon thereafter, Sowers met with Smith and Miller and personally informed them of the sexual assault by Wright. Other meetings were held during the fall and early winter between Sowers, Smith and Miller. *Id.* at par. 15. The plaintiff alleges that Smith and Miller actively discouraged her from pursuing her remedies in court against Wright "through intimidation, threats and coercion," and indicated that they did not believe her. *Id.* at par. 16. In January 1980, Smith told Sowers that if she wanted to remain in the school marching band she would have to publicly apologize for having accused Wright of the sexual assault. *Id.* at par. 17. When Smith had assembled the band members, Sowers did not apologize, instead leaving the band room "in an extremely emotional state." *Id.* at par. 18.

The plaintiff's complaint goes on to list numerous instances where female students reported subsequent episodes of sexual abuse by Wright and other male teachers at the Bradford high school to the defendants. *Id.* at pars. 26(d) - (1). In none of these cases did the defendants pursue disciplinary action against the molesting male teachers beyond issuing an occasional "no one-on-one" directive. For example, in late September or early of 1984, a female band member told her guidance counselor that Wright had attempted to sexually molest her in a vehicle. *Id.* at par. 26(i). This student also told the counselor that

Wright was currently molesting another student and had molested yet another student who had graduated. *Id.* The accusation was relayed to defendants Smith and Shuey. On December 15, 1984, Smith met with Wright and issued another "no one-on-one" directive, but informed Wright that no one accused him of any wrongdoing." *Id.* at par. 26(j). The plaintiff also alleges that Smith maintained a personal, secret file in his desk drawer at home, memorializing many of the complaints. *Id.* at par. 37. The school administration's alleged toleration of Wright's abuse of female students came to an end in March of 1986 when fresh allegations brought about meetings between school administrators and parents of children who had been assaulted by Wright. Wright was suspended as of March 10, 1986, and later resigned.

DISCUSSION

I. Defendants' Motion to Strike Portions of the Complaint

The defendants' move to strike portions of paragraphs 25 and 26 of the complaint, as well as all of paragraph 20. They assert that paragraphs 25 and 26 "contain immaterial, impertinent and scandalous matters, consisting of allegations of conduct involving teachers other than Plaintiff, students other than Plaintiff, and conduct subsequent to the alleged injury to Plaintiff, all of which has no bearing in any way on the alleged injury to this Plaintiff." Defendants Motion to Dismiss and/or Strike, p. 2. Paragraph 25 mentions no teachers or students at all, thus we

do not understand the defendants' reason for striking it, and we will not do so. Paragraph 26 indeed refers to teachers other than Wright, and students other than the plaintiff (albeit these students are referred to by initials, not by name). Because the plaintiff's case depends upon establishing a policy or custom which was adhered to in response to numerous allegations of child abuse by various teachers at the school district, such allegations are relevant to her case. While we agree with the defendants that the conduct described in these allegations could be viewed as scandalous, we do not agree that they are immaterial or impertinent, and we will deny their motion to strike.

II. Defendants' Motion to Dismiss the Complaint

The defendants offer a number of grounds for dismissal of the Sowers complaint against them, allegations the defendants scorn as "impertinent "[3] Defendants' Brief in Support at 2; *see also* Defendants' Motion to Dismiss and/or Strike, p. 2. Defendants argue that the complaint fails to state a claim under § 1983 and that the action is barred by the two-year statute of limitations.

In order to properly decide the motion to dismiss, it is necessary to analyze the required elements of a cause of action under § 1983, as well as the questions surround-

[3] It is unclear whether the defendants intend the word "impertinent" in the sense of "presumptuous, rude, uncivil," or "not pertinent, irrelevant." *See Random House Collegiate Dictionary,* revised ed. 1980, p. 667. If true, the plaintiff's allegations are anything but impertinent, in either sense of the word.

ing the limitations period. An analysis of the most salient issues begins with the question of whether the plaintiff's complaint alleges a deprivation of a constitutional right "under color of law. In cases such as this where a plaintiff alleges that the defendants' policy or custom resulted in the failure to carry out an alleged duty to protect the plaintiff, a court must find a "special relationship" between the plaintiff and the state body or official creating a duty to protect. In addition, where a claim is based upon a failure to act by the defendants, a court must consider whether that failure to act: (I) was a substantial factor leading to a violation of a constitutionally protected liberty or property interest; and (2) displayed "deliberate indifference" or "gross negligence" with regard to that violation.

A. Standard for Deciding a Motion to Dismiss

A motion to dismiss tests the formal sufficiency of the statement of the claim for relief, addressing itself solely to the failure of the complaint to state a claim for relief. Wright & Miller, *Federal Practice And Procedure* § 1356 (1987 Supp.). To merit dismissal, the plaintiff's pleading must fail to meet the liberal requirements for pleading a claim set forth in Rule 8(a), which calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.*; Fed. R. Civ. P. 8(b). For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its allegations taken as true. *Id.* at § 1357. In general, a court has broad discretion in ruling on a motion to dismiss, but

dismissal should only be granted with care in order to avoid improperly denying plaintiff the opportunity to have her claim adjudicated on the merits. *Id.* "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims." *Estate of Bailey By Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985) (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974)).

B. Deprivation of a Constitutional Right "Under Color of State Law"

To state a claim under § 1983 an individual must allege facts constituting a deprivation of a constitutional right under color of state law. An official's actions are not removed from under color of state law merely because the official acted beyond the scope of the authority granted by state law. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is taken "under color of" state law. *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941); *Doe "A" v. Special School Dist. of St. Louis Co.*, 637 F. Supp. 1138, 1142 (E.D. Mo. 1986); *accord Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The plaintiff's complaint alleges that there existed a practice, custom and/or policy which caused the deprivation of her constitutional rights. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent

official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978); *see also Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 506 (3d Cir. 1985). "In an appropriate case, even in the absence of formal agency conduct, an 'official policy' may be inferred 'from informal acts or omissions of supervisory municipal officials.'" *Estate of Bailey by Oare*, 768 F.2d at 506 (*quoting Turpin v. Mailet*, 619 F.2d 196, 200 (2d Cir.), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980)). By these standards, we believe the complaint sufficiently alleges that the defendants caused a deprivation of her constitutional rights "under color of state law."[4]

C. Special Relationship

In § 1983 actions such as this one where a plaintiff asserts a right of protection, courts require that there exist a "special relationship" between the plaintiff and defendant which would create a duty to protect. *See Jensen v. Conrad*, 747 F.2d 185, 194-95 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985). In *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982), the Seventh Circuit refused to hold the state liable for a murder committed by a schizophrenic (with a history of criminal

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[4] Public officials are liable under § 1983 if the official *causes* an individual to be deprived of a constitutional right. *Baker v. McCollon*, 443 U.S. 137, 142, 99 S.Ct. 2689, 2693, 61 L.Ed.2d 433, 440 (1979).

violence) one year after being released from a state mental hospital. Judge Posner stated "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers*, 686 F.2d at 618. Judge Posner, a jurist renowned as a theorist in tort law, acknowledged that where the state is responsible for placing a person in a position of danger or potential harm, the state would owe an affirmative duty obligating the state to protect that person. Judge Posner wrote:

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tort feasor as if it had thrown him into a snake pit. It is on this theory that state prison personnel are sometimes held liable under section 1983 for the violence of one prison inmate against another.

Bowers, 818 F.2d at 618. The Fourth Circuit later noted that the Bowers finding that the general public has no constitutional right to protection, and the state no duty to protect, from criminals and madmen, was expressly qualified by its acknowledgment that "such a right and corollary duty may arise out of *special custodial or other relationships* created or assumed by the state in respect of particular persons." *Fox v. Curtis*, 712 F.2d 84, 88 (4th Cir. 1983) [emphasis added]. Courts have found the "special relationship" requirement, the nexus between a plaintiff

and the state necessary to an action under § 1983, to be a standard that is elusive and difficult to define.

Estate of Bailey by Oare v. County of York involved a county children's services agency's involvement in the tragic abuse and death of a five-year-old girl. 768 F.2d 503 (3d Cir. 1985). The girl lived with her mother and her mother's boyfriend when relatives noticed severe bruises and other evidence of abuse on the child's body. When the relatives contacted the police and the child services agency, the agency had the girl examined by a physician. The physician advised that the boyfriend be denied access to the child, and that the girl should be taken from the mother if necessary to deny the boyfriend access. The next day the county agency returned the child to the mother's custody, undertaking no independent investigation to determine what access the boyfriend might have. A month later the girl died from physical injuries inflicted on her by the boyfriend and mother. *Id.* 768 F.2d at 505. The Third Circuit found there to be a "special relationship" between the little girl and the childrens services agency and the county, noting that the plaintiff alleged that the defendants had evidence of previous abuse, was aware of the source of abuse and inadequately investigated the danger. The circuit court therefore vacated and remanded the district court's granting of the defendants' motion to dismiss. *Id.* at 510. "When the agency knows that a child has been beaten, '[t]his strengthens the argument that some sort of special relationship has been established.'" *Id.* at 510-11 (*quoting Jensen v. Conrad*, 747 F.2d 185, 195 n. 11 (4th

Cir. 1984), *cert. denied*, 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985) (suggests special relationship where state agency failed to intervene to prevent beatings of children by their guardians)).

The Third Circuit's "special relationship" analysis in *Estate of Bailey by Oare* highlighted two cases as examples of instances where a "duty of protection has been found owing by the state and local entities to persons who were not in custody." *Id.* at 510. The first was *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), in which the Seventh Circuit reversed the dismissal of a complaint alleging that police who had arrested the driver of a car subjected the three passenger children to a health-endangering situation by abandoning them. That court had reasoned that "the police could not avoid knowing that, absent their assistance, the three children would be subjected to cold weather and danger from traffic. This indifference in the face of known dangers certainly must constitute gross negligence." *Id.*, 592 F.2d at 385. The second example given was *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), which involved an allegation local police systematically failed to adequately protect women abused or assaulted by a spouse or boy friend. The *Thurman* court stated, "City officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community." *Id.*, 595 F. Supp. at 1527. This duty was held to require officials having notice of the possibility of attacks on women in domestic relationships "to take reasonable measures to

protect the personal safety of such persons in the community." *Id.*

There is a significant, although not dispositive, distinction between the facts of *Estate of Bailey by Oare, White* and *Thurman* on the one hand, and the present case. In those cases, the plaintiff toward whom a special relationship and duty existed had been individuals whose specific need for state protection were identifiable prior to their injury. In the present case the vulnerability to sexual abuse due to the defendants' customs, practices and/or policies was shared by all the female students at the high school. Even if the plaintiff's allegation that the defendants had prior notice of Wright's propensity for sexual abuse is taken as true, the potentially endangered group would include, at the least, all females belonging to the marching band.[5]

A number of cases have found a "special relationship" to exist when an identifiable group, rather than a specific individual, was endangered. In *P.L.C. v. Housing Authority of County of Warren*, a tenant in a public housing project brought a civil rights action after she was raped by a county housing authority employee who entered her apartment using a housing authority key. 588 F. Supp. 961 (W.D. Pa. 1984). Her complaint alleged that the housing authority knew or should have known of the assailant's prior convictions for rape and his alcoholism when they

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[5] The Court has no information regarding the number of females in the Bradford marching band at that time.

hired him as a maintenance man. *Id.*, 588 F. Supp. at 962. In *P.L.C.*, as in the case at bar, the danger posed by the housing authority's conduct (or lack thereof) was shared by the plaintiff as a member of an identifiable group of potential victims, i.e., the female residents of the housing project. Judge Weber found "that the authority and its officials stood inn a special relationship to this particular plaintiff." *Id.*, 588 F. Supp. at 965.[6]

Similarly, in *Beck v. Kansas Univ. Psychiatry Foundation*, 580 F. Supp. 527 (D. Kansas 1984), two individuals were shot to death at the University of Kansas Medical Center emergency room by a released prisoner with a known propensity for violence against the medical center, its staff, patients and visitors. *Id.*, 580 F. Supp. at 531. Denying a motion to dismiss by the defendant Kansas Adult Authority, the state agency which released the assailant despite knowledge of his potential for violence at the medical center, the court found that the Adult Authority had a duty to take into account "the best interests of society." The court concluded that "[c]ertainly that duty includes taking into account the special danger which the inmate may have to an identifiable group or individual."

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[6] *Compare Wright v. City of Ozark*, 715 F.2d 1513 (11th Cir. 1983), in which a woman raped by an unknown assailant brought a § 1983 action against the city, the mayor, the police chief and a member of the police department alleging that the defendants had deliberately suppressed information of prior rapes in a certain area of the city to avoid adverse publicity. The Eleventh Circuit found there to be no "special relationship" because the defendants had not intentionally singled her out to be denied protection from a rapist and there was no al legation that the defendants knew of the plaintiff before the rape occurred.

Id., 580 F. Supp. at 534. Thus, a special relationship was found between the state authority and an identifiable group, namely the staff, patients and visitors of the medical center. Thus, the *Beck* court concluded that the plaintiffs' complaint alleged a "special relationship" between the Kansas Adult Authority and the plaintiffs.

In the present case, the question is whether the defendants were in a "special relationship" with the endangered "identifiable group," female students (or band members) at the Bradford high school. We find that the defendants owed a duty to protect its students from sexual abuse by its teachers. We think this duty is at least as clear as those owed to the tenants in *P.L.C.*, the abused women in *Thurman*, or the visitors to the medical center in *Beck*. The people and the legislature of Pennsylvania trust their children to the care and supervision of school officials, and grant those officials in loco parentis authority over those children while they attend school.[7] In addition, school districts are statutorily authorized to fire teachers for "immorality," which has been held to include uninvited

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[7] The Pennsylvania Public School Code states that:

> Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

24 P.S. § 13-1317 (1988 P.P.).

advances by teachers toward students. 24 P.S. § 11-1122; *see Keating v. Bd. of School Directors of Riverside School District*, 513 A.2d 547, 99 Pa.Cmwlth. 337 (1986), *app. denied*, 522 A.2d 51, 514 Pa. 626 (1987). As we stated in *Stoneking v. Bradford Area School District*, "abuse of this type is not tolerated when the victim is a prison inmate or a patient in a state hospital. Clearly then, the constitution must offer school children similar protections." 667 F. Supp. at 1095 [citations omitted]. We find that a "special relationship," with an accompanying duty to protect, exists between a student and her school district, school district superintendent, principal and vice principal.

The defendants raise the factual distinction that this assault took place off school grounds at the teacher's home, at the beginning of summer vacation. The defendants argue that "in no sense of the word could any 'special relationship' exist at the time of this alleged assault." Defendants' Brief in Support, p. 17 n. 7. Under the facts of this case, we do not agree. The increased threat to female students created by the defendants' alleged tolerance for sexual abuse was not the sort of danger that disappeared when those students packed up their instruments and walked out of the band room. Because Wright conducted marching band practices during the summer months, his opportunity to abuse his female band students, opportunity he possessed by virtue of his position as a teacher and director of the band, did not disappear when the school bell sounded the end of day or the beginning of vacation-time. Presumably it would have made little

difference if the maintenance man in *P.L.C. v. Housing Authority of the County of Warren* had been off-duty, or on vacation, when he used his housing authority key to enter the rape victim's apartment. Similarly, it is irrelevant to this Court in determining the existence of a "special relationship," whether Sowers was assaulted while she was picking up a marching band tape for band practice to be held during the school year or during the summer months. The timing and circumstances of the assault may or may not be relevant to the factual determination of causation of Sowers' injury, but, as we will discuss later in this decision, the question of proximate cause requires factual development and is therefore inappropriate to decide on a motion to dismiss.

D. Requirements for Liability Under § 1983 For A Failure To Act

The defendants are alleged to have fostered a practice, custom and/or policy of reckless indifference and/or active concealment of instances of known or suspected sexual abuse. The complaint alleges that this practice, custom and/or policy was the result of both overt activity and failures to act on the part of the defendants. Government officials may be held liable under § 1983 for a failure to do what is required as well as for overt activity which is unlawful and harmful. *See Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 141 (2d Cir. 1981) [Doe I]; *Duchesne v. Sugarman*, 566 F.2d 817,

822 (2d Cir. 1977) ("where conduct of the supervisory authority is directly related to a denial of a constitutional right, it is not to be distinguished as a matter of causation, upon "whether it was action or inaction"). For a § 1983 cause of action to arise where an official is charged with failing to exercise an affirmative duty, the failure to act must have been a substantial factor leading to the violation of a *constitutionally protected liberty or property interest. Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). The official having the responsibility to act must also have displayed "*deliberate indifference*" or "*gross negligence*." *Turpin v. Mailet*, 619 F.2d 196 (2d Cir.), *cert. denied sub nom. Turpin v. West Haven*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980) ("deliberate indifference" standard); *Doe v. New York City Dept. of Social Services*, 709 F.2d 782, 789-790 (2d Cir. 1983) [Doe II], *cert. denied sub nom. Catholic Home Bureau v. Doe*, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983) ("gross negligence" standard) (*citing Youngberg v. Romeo*, 457 U.S. 307, ___, 102 S.Ct. 2452, 2462, 73 L.Ed.2d 28 (1982)). As our reasoning below will explain, we believe that these two requirements, an alleged violation of a protected liberty interest and an alleged display of "deliberate indifference" or "gross negligence," are met in the plaintiff's complaint.

1. Violation of a Liberty Interest: Substantive Due Process

The first of the two requirements for a § 1983 claim for a failure to act is that the failure to act must have

been a *substantial factor* leading to the violation of a constitutionally protected liberty or property interest. As to whether the plaintiff has alleged that the defendants' failures to act amounted to a substantial factor leading to the constitutional violation, we believe the complaint does so allege. Furthermore, as we will explain later in the statute of limitations section of this opinion, the question of causation is not amenable to determination on the basis of pleadings alone. We will therefore move on to the question of whether the plaintiff has properly alleged a constitutionally protected liberty interest.

The liberty interest which the plaintiff alleges was deprived her was a substantive due process right to be free from sexual abuse. Substantive due process rights are significantly different from procedural due process rights. Procedural due process involves expectations created by state law. As to these rights, the state may take them away by affording pre-deprivation hearings, post-deprivation hearings or other safeguards. Substantive due process, on the other hand, is concerned with rights such as those listed in the Bill of Rights and those rights held to be so fundamental that a state may not take them away regardless of the fairness of the procedures used to do so. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 663, 88 L.Ed.2d 662, 668 (1986). Justice Frankfurter noted that the scope of due process protection is not subject to precise definition:

> Due process of law is a summarized constitutional guarantee of respect for those personal

> immunities which, as Mr. Justice Cardozo twice wrote for the Court, are so rooted in the traditions and conscience of our people as to be ranked as fundamental, *Snyder v. Massachusetts*, 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 L.Ed.2d 674], or are implicit in the concept of ordered liberty. *Palko v. Connecticut*, 302 U.S. 319, 325 [58 S.Ct. 149, 152, 82 L.Ed.2d 288].

Rochin v. California, 342 U.S. 165, 169, 72 S.Ct. 205, 208, 96 L.Ed.2d 183 (1952). Due process "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). "The content of substantive due process must be determined in each case through disinterested inquiry and by judgment not ad hoc and episodic but duly mindful of reconciling the needs of both continuity and of change in a progressive society." *Doe "A" v. Special School District of St. Louis County*, 637 F. Supp. 1138, 1144 (E.D. Mo. 1986) (*citing Rochin v. California*, 342 U.S. at 172, 72 S.Ct. at 209.)

Courts have recognized that substantive due process includes the right to be free from state intrusions into personal privacy and bodily security.[8] Illustrative of th·

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[8] *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S.Ct. 1401, ___, 51 L.Ed.2d 711, 731-732 (1977) (corporal punishment of students by teachers, substantive due process right to personal security); *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (forcible use of stomach pump by police); *Taylor By And Through Walker v. Ledbetter*, 818

substantive due process rights of students is a recent Missouri case, *Doe "A" v. Special School District of St. Louis Co.*, 637 F. Supp. 1138 (E.D. Mo. 1986). That action concerned nine handicapped children who had repeatedly been beaten and sexually abused over the course of a year and a half by a school bus driver while they were passengers aboard his bus. Claims were brought under § 1983 against the bus driver, the school district and twelve individual school administrators. *Id.* at 1141. Despite receiving complaints from parents, teachers and other school employees, it was alleged that the school district and school administrators: (1) failed to investigate the complaints; (2) concealed the bus driver's actions by discouraging investigation; (3) failed to develop a policy to provide training for the investigation of complaints and to screen employees for their propensity to abuse children; (4) failed

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F.2d 791 (11th Cir. 1987) (foster child suit against state and county officials for injuries received in custody of foster parents); *Davis v. Forrest*, 768 F.2d 257, 258 (8th Cir. 1985) (two police officers' unnecessary beating plaintiff with flashlights); *Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 141-145 (2d Cir. 1981) (municipality liable under § 1983 for deliberate indifference to sexual abuse of foster child by foster parent); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (severe corporal punishment inflicted upon grade school student by teacher violated student's substantive due process rights); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police arrest driver of car, abandoning three passenger children); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973) (unprovoked beating of pretrial detainee by guards); *Jenkins v. Averitt*, 424 F.2d 1228, 1231-32 (4th Cir. 1970) (reckless pistol shooting of suspect by police); *Doe "A" v. Special School District of St. Louis County*, 637 F. Supp. 1138 (E.D. Mo. 1986) (handicapped children beaten and sexually abused by school bus driver); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (police with notice of possibility of attacks on women in domestic relationships).

to report the bus driver's conduct to law enforcement and child protective agencies despite their statutory obligations to do so. *Id.* at 1142.

When the defendants in *Doe "A"* moved to dismiss the § 1983 claims for failure to allege conduct arising under color of state law and failure to allege actions which rise to the level of constitutional violations, the district court denied the motions. The court first found that the bus driver, as a school district employee, acted under color of state law. *Id.* at 1143. After examining the legal development of substantive due process rights, the court stated that "this Court does not doubt that the constitutional rights of children to be free from harm is commensurate with the rights of adults in state custody." *Id.* at 1145. The court concluded that:

> The acts of abuse alleged by plaintiffs state a substantive due process claim. The acts intrude upon the personal privacy and bodily integrity of these children. The acts intrude in ways more personal and private than a jailhouse beating and in ways which will surely leave psychological scars long after physical healing is complete. . . . The alleged acts of [the bus driver] and the alleged tolerance of these acts by [the school district] and the individual defendants pass beyond the pale of common law torts. They shock the conscience of this Court.

Doe "A", 637 F. Supp. at 1145.

In *Hall v. Tawney*, a case involving the infliction of severe corporal punishment on grade school students, the Fourth Circuit explained the substantive due process right at issue as:

> the right to be free of state intrusions into the realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court. The existence of this right to ultimate bodily security - the most fundamental aspect of personal privacy - is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible.

Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (citations omitted). The court explained that it "simply do not see how" it could fail to uphold the right in "public school children under the disciplinary control of public school teachers" when the right was upheld in persons charged with or suspected of crime and in the custody of police officers. *Id.*

We think it apparent that the plaintiff's complaint alleges a deprivation of Sowers' right to be free from

state intrusions, in this case by her teacher, into her personal privacy and bodily security. Because such a right is embraced within the scope of substantive due process, this satisfies the requirement that her complaint allege a violation of a constitutionally protected liberty interest.

2. "Deliberate Indifference" or "Gross Negligence" by Defendants

The second requirement for a § 1983 claim for a failure to act is that the official having the responsibility to act must display "deliberate indifference" or "gross negligence." The question is whether this requirement is met by the plaintiff's al legation of "reckless indifference" by the defendants. Traditionally the term gross negligence" has been held equivalent to the words "reckless and wanton," *see, e.g., Jones v. Commonwealth*, 213 Ky. 356, 281 S.W. 164, 167 (1926), and the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), has characterized deliberate indifference as "the wanton infliction of unnecessary pain." 429 U.S. at 105, 97 S.Ct. at 291. Furthermore, in *Estate of Bailey by Oare*, the Third Circuit described the burden of proof on the plaintiffs in that § 1983 action as "[permitting] the fact finder to infer deliberate or *reckless indifference* or unconcern or callous disregard for" the deceased plaintiff's safety. *Estate of Bailey by Oare*, 768 F.2d 503, 508 (3d Cir. 1985) [emphasis added]; *see also Commonwealth Bank & Trust Co., N.A. v. Russell*, 825 F.2d 12, 17 (3d Cir. 1987). We therefore conclude that the plaintiff's allegation of "reckless indif-

ference" properly states a claim against the defendants under § 1983.

Because the plaintiff's complaint properly alleges a claim under § 1983, we will deny the defendants' motion to dismiss the complaint for failure to state a claim.

III. Statute of Limitations and Discovery Rule for Tolling

In *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court ruled that the statute of limitations for § 1983 actions is the statute of limitations for the relevant state's personal injury statute. Since this § 1983 action arose within the Commonwealth, we must apply the two-year statute of limitations set forth in 42 Pa.C.S.A. § 5524(2). *See Sullivan v. City of Pittsburgh Pa.*, 811 F.2d 171 (3d Cir.), *cert. denied*, 56 U.S.L.W. 3244, 108 S.Ct. 148, 98 L.Ed.2d 104 (1987); *Stoneking v. Bradford Area School District*, 667 F. Supp. 1088, 1091 (W.D. Pa. 1987).

Federal courts have recognized a "discovery rule" for setting the date from which the two-year statute of limitation would begin to run. Courts distinguish between the date when a cause of action accrues and the tolling of a statute of limitations.[9] State law governs the tolling of the

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[9] A cause of action "accrues" when a suit may be maintained thereon, whenever one person may sue another. Black's Law Dictionary (rev. 4th ed., 1968) p. 37. The tolling of a statute of limitations essentially "stops the clock" with regard to the limitation. This includes the delay of the initial running of the limitations period, interruption of the running of the limitations period, or timely filing of the action within the statutory limitations period.

statute, unless state law is inconsistent with the purposes behind the civil rights acts. *Board of Regents v. Tomanio*, 446 U.S. 478, 484-86, 100 S.Ct. 1790, 1795-96, 64 L.Ed.2d 440 (1980) (§ 1983 claim).[10] The accrual of a civil rights action, however, is a question of federal law. *Dreary v. Three Un-named Police Officers*, 746 F.2d 185, 197 n. 16 (3d Cir. 1984); *Sandutch v. Muroski*, 684 F.2d 252, 254 (3d Cir. 1982) (per curium) (*citing Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975)); *Plain v. Flicker*, 645 F. Supp. 898, 901 (D. N.J. 1986) (claims under 42 U.S.C. §§ 1983, 1985). We consider the accrual of the cause of action to be the threshold statute of limitations issue because any state tolling doctrine would not come into play until the cause of action had accrued. Under federal law, a § 1983 claim accrues when the plaintiff knows or has reason to know of the injury that constitutes the basis of her action. *Id.* Federal courts have fashioned a "discovery rule" which requires that a cause of action accrues when the plaintiff becomes aware, or should have become aware, of both the fact of injury and its causal connection to the defendant, although the plaintiff need not know that the defendant's conduct is tortious or unlawful.[11] *United States v.*

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[10] *See also Wilson v. Garcia*, 471 U.S. 261, 269 & n. 17, 105 S.Ct. 1938, ___ & n. 17, 85 L.Ed.2d 254, 262 & n. 17; *Johnson v. Railway Express Agency, Inc.*, 421, U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

[11] As this Court noted in *Stoneking v. Bradford Area School District*, 667 F. Supp. 1088 (W.D. Pa. 1987), Pennsylvania courts have also recognized a "discovery rule" exception to its statute of limitations. *Id.* at 1092 & n. 5. *See Lewey v. H.C. Frick Coke Co.*, 166 Pa. 535, 547, 31 A. 261, 263 (1895); *Bowser v. Guttendorf*, 1988 Pa. Super. LEXIS 1424, 541 A.2d 377,

Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) (discovery rule under Federal Tort Claims Act); *see also Plain v. Flicker*, 645 F. Supp. 898, 901 (D. N.J. 1986) (applying *Kubrick* rule to § 1983 action); *Hauptmann v. Wilentz*, 570 F. Supp. 351, 396 (D. N.J. 1983), *aff'd* 770 F.2d 1070 (3d Cir.), *cert. denied* 474 U.S. 1103, 106 S.Ct. 807, 88 L.Ed.2d 922 (1986) (also applying *Kubrick* rule to § 1983 claim).[12]

The *Kubrick* rule's distinction between a plaintiff's knowledge of her injury and knowledge of the defendant's causal connection to the injury is illustrated by the Fifth Circuit's decision in *Lavellee v. Listi*, 611 F.2d 1129 (5th Cir. 1980). In *Lavellee*, the plaintiff alleged that on September 8, 1976 he had been arrested and then transport-

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380 (1988); *Anthony v. Koppers Co.*, 284 Pa.Super. 81, 425 A.2d 428 (1980), *rev'd on other grds.*, 496 Pa. 119, 436 A.2d 181 (1981) ("as the rule has developed it has become clear that its basis is not concealment by the defendant but rather the ability of the plaintiff to discover . . . [her] injury or its cause." *Id.* at 95, 425 A.2d at 436); *see also Burnside v. Abbot Laboratories*, 351 Pa. Super. 264, 292, 505 A.2d 973, 988 (1985) ("[W]here the issue involves a factual determination regarding what is a reasonable period of time for a plaintiff to discover [her] injury and its cause the determination is for the jury.").

12 While it is not necessary as yet for us to decide whether the defendants actively concealed their alleged unlawful conduct, as the complaint alleges, active concealment by a defendant tolls the running of the statute until a plaintiff discovers the cause of action or discovers facts that reasonably put her on notice of it. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed.2d 743 (1946) (the equitable tolling doctrine "is read into every federal statute of limitations."); *Plain v. Flicker*, 645 F. Supp. at 902 (§ 1983 claim); *Cohen v. McAllister*, 673 F. Supp. 733, 739-740 (W.D. Pa. 1987). *See also Redenz by Redenz v. Rosenberg*, 360 Pa.Super. 430, 520 A.2d 883 (1987) (if tortfeasor actively conceals, statute of limitation tolled until injured person can overcome concealment).

ed to a hospital where he was forced by several defendant deputy sheriffs to undergo an extraction of his spinal fluid, a procedure performed by defendant medical personnel. He was then locked in a bare, unsanitary, padded cell where his pleas for an examination for the pain in his back were first met with threats of beatings, after which he was placed in irons and locked, hands and feet, to a drain pipe, in a fetal position. *Id.* at 1130. The plaintiff alleged that he was not allowed to see a physician until February 3, 1977, nearly five months later, at which time he first discovered that his back had been permanently injured. The plaintiff filed his action for medical malpractice and civil rights (under § 1983) on January 10, 1978. Noting the one year limitations period borrowed from Louisiana law, the district court dismissed the plaintiff's civil rights and medical malpractice claims for the incidents occurring prior to January 10, 1977. The Fifth Circuit reversed and remanded the dismissal of the malpractice claim, arguing that:

> If the plaintiff was unaware of the permanence of his injury, and reasonably thought that the pains in his back were the normal result of a spinal tap or were caused by the alleged assaults, he cannot be deemed to have knowledge of the factual predicate of his claim or its connection with possible malpractice by the defendants. Until he suspected, or should have suspected, that his pain was not the result of a properly-conducted spinal tap or of the alleged assaults, he lacked any factual basis on

> which to suspect an invasion of his legal rights.

Lavellee v. Listi, 611 F.2d at 1131-1132.

In *Lavellee*, as with the present case, there is a crucial, if subtle, distinction between the plaintiffs' knowledge of his or her injury and knowledge of the causal connection between the injury and a particular defendant's actions. The plaintiff in *Lavellee* certainly knew or should have known soon after his involuntary spinal tap and shackling that somehow he had been injured at the hands of the deputy sheriffs, just as the plaintiff in the case at bar knew that she had been sexually assaulted and injured by Mr. Wright. Nonetheless, the Fifth Circuit found that the plaintiff in Lavellee could not necessarily be expected to know that his permanent back injury was also proximately caused by an improperly conducted spinal tap operation by the defendant medical personnel Likewise, the critical question this Court now faces is whether Sowers knew or should have known that the school district, superintendent, principal and assistant principal had fostered an environment of deliberate indifference toward teacher abuse of female students which was a proximate cause of her injury.

The defendants argue that this action should be barred by the statute of limitations because: (1) defendants did not have a policy or custom of reckless indifference; (2) their conduct was not a cause of the plaintiff's injury; and (3) even if their conduct was found to be a cause of her injury, the plaintiff knew or should have known of that

causal connection in late 1979 or early 1980, when school administrators pressured her to renounce her charges and publicly apologize to Wright.

The defendants direct this Court's attention to the Third Circuit's decision in *Sandutch v. Muroski*, 684 F.2d 252 (3d Cir. 1984), to recast the federal discovery rule for accrual of a cause of action as follows:

> that notice of improper conduct by government officials should lead a plaintiff, by the exercise of due diligence, to the awareness that he has a cause of action against the government officials based upon a conspiracy to violate his civil rights.

Defendants' Brief in Support, p. 7. This is an inaccurate statement of the holding of *Sandutch*,[13] as well as of the

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[13] *Sandutch* was a civil rights action against state prosecutors alleging a violation and conspiracy to violate the plaintiff's constitutional rights by obtaining a false confession from an alleged co-conspirator and using it to prosecute the plaintiff, Sandutch, for arson and murder. 684 F.2d 252. The false testimony linking Sandutch to the crime was given during a preliminary hearing and was introduced at his criminal trial. After the preliminary hearing but prior to trial the alleged co-conspirator recanted, saying his statements were made under duress. Sandutch's attorney attempted to introduce the taped recantation at the criminal trial, but the court excluded it. Several years later in September, 1980 (after Sandutch had been convicted and jailed) Sandutch obtained an affidavit from the alleged co-conspirator explaining the circumstances under which the false statement was obtained. Sandutch filed his civil rights action two weeks later, arguing that he neither knew nor had reason to know of his injury until he received the September, 1980 affidavit.

The Third Circuit found that Sandutch should have known of the alleged conspiracy because:

actual federal discovery rule. While the actual discovery rule delays accrual of a cause of action until a plaintiff knew or should have known of the injury and its causal connection to the defendant, the defendants' misstatement of the rule would have the cause of action accrue when the plaintiff receives "notice of improper conduct by government officials." *Id.* Defendants use this inaccurate statement of the rule to argue that Sowers' cause of action accrued at the time of her September, 1979 meeting with Smith and Miller at which she alleges the defendants engaged in "improper conduct," by attempting to intimidate, threaten and coerce her into retracting her allegations against Wright. *Id.* at 9. The defendants assert that "[s]urely the alleged overt and hostile conduct of Defendants at this meeting was sufficient, as a matter of law, to put [Sowers] on notice of the conspiracy." *Id.* However, the defendants' treatment of Sowers after the assault was not, and obviously could not have been, a cause of her assault. There is no al legation that Sowers knew of the defendants' handling of previous sex abuse complaints against teachers. Furthermore, there are many credible

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> although at that time Sandutch may not have known all the facts necessary to establish that the defendants conspired to deprive him of his right, his 1976 knowledge of the alleged falsity of [the alleged co-conspirator's] statement obtained under duress should have led, by the exercise of due diligence, to the awareness that he had a cause of action. The statute began to run then.

684 F.2d at 254. Nowhere in the *Sandutch* decision do we find any reference to the "notice of improper conduct" discovery rule represented to this Court by the defendants.

explanations for why observance of the defendants' conduct at the 1979 meetings might not be expected to lead her to the conclusion that there was a policy of reckless indifference (e.g., Sowers thought that the defendants simply did not believe her allegations). Merely because the plaintiff had witnessed some "improper conduct" by the defendants did not necessarily give her reason to know of an ongoing policy of reckless indifference to numerous complaints of sexual abuse by teachers which might have been a proximate cause of her own injury.

In order for this Court to decide the statute of limitations question, we must consider the allegations of the plaintiff's complaint with relation to the "knew or *should have known* standard. As to the question of whether the plaintiff actually knew of her injury and the causal connection between her injury and the defendants' conduct, the plaintiff insists that it was not until Edward Wright's history of sexual abuse was revealed to the Bradford community in March, 1986 that she knew of the defendants alleged reckless indifference toward the problem. Bearing in mind our responsibility to construe the facts in the light most favorable to the plaintiff when ruling on a motion to dismiss, we must conclude for the purpose of this motion that it was not until March, 1986 that Sowers actually knew how the defendants' conduct was proximately caused her injury.

The more difficult question is whether or not Sowers should have known of the causes of her injury. The Third Circuit has stated that "[w]hether or when a plaintiff

knows or has reason to know of the existence and cause of his or her injury will often turn on inferences drawn from disputed facts." *Van Buskirk v. Carey Canadian Mines. Ltd.*, 760 F.2d 481, 487 (3d Cir. 1985) (affirming jury finding that plaintiff knew or had reason to know of cause of asbestos-related condition more than two years prior to lawsuit). We find it significant that the plaintiff's complaint alleges more than one incident of abuse of female students by teachers prior to Wright's June, 1979 assault upon the plaintiff, with school officials taking only minimal disciplinary action in response.[14] We are not sure that these alleged prior incidents will prove a formal policy or custom, but as the Third Circuit stated in *Estate of Bailey By Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985), "even in the absence of formal agency conduct, an 'official policy' may be inferred 'from informal acts or omissions of supervisory municipal officials'. . . . '[t]he issue of authorization, approval or encouragement is generally one of fact, not law.'" *Id.* at 506 (citations omitted) (*quoting Turpin v. Mailet*, 619 F.2d 196, 200, 201 (2d Cir.), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980); *see also Owen v. City of Independence*, 445 U.S. 622, 633-34 & n. 13, 655 n. 39, 100 S.Ct. 1406-07

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[14] We view the plaintiff's allegations concerning the defendants' handling of sexual abuse incidents prior to the Sowers episode as relevant evidence of policy or custom of deliberate indifference toward such behavior by teachers. This does not mean that this Court has decided that evidence of subsequent acts may not also tend to prove the nature of a prior conspiracy. *See, e.g., Grandstaff v. City of Borger*, Tex., 767 F.2d 161, 171 (5th Cir.), cert. denied 55 U.S.L.W. 3607, 107 S.Ct. 1369, 94 L.Ed.2d 686 (1987).

& n. 13, 1417 n. 39, 63 L.Ed.2d 673 (1980). We believe that the plaintiff is entitled to offer evidence to support her claim that she did not know, and should not have been expected to know, that there existed an environment of reckless indifference toward sexual abuse of female students by teachers at the Bradford Area School District.

We think the plaintiff is also entitled to an opportunity to engage in discovery and attempt to prove that the alleged practice, custom and/or policy of reckless indifference to students' complaints of sexual abuse of female students by male teachers was a proximate cause of her injury. The Third Circuit has stated that "[o]rdinarily, proximate cause cannot be determined on the basis of pleadings but instead requires a factual development at trial." *Estate of Bailey By Oare v. County of York*, 768 F.2d at 511 (*citing Black v. Stephens*, 662 F.2d 181, 190-91 (3d Cir. 1981), *cert. denied*, 445 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982) (jury question whether policy at issue proximately caused injury)). "Whether there is an 'affirmative link' between 'the adoption of any plan or policy express or otherwise' and the injury complained of is ordinarily an issue that requires a factual development." *Id.* at 511 (*quoting Rizzo v. Goode*, 423 U.S. 362, 371, 96 S.Ct. 598, 604, 46 L.Ed.2d 561, 569 (1976).

We think factual development will be necessary to make a determination as to whether the defendants alleged conduct was a proximate cause of the plaintiff's injury, and if the plaintiff knew or should have known of that alleged causal connection between the defendants'

conduct and the sexual assault upon Sowers. We will therefore deny the defendants' motion to dismiss the action as barred by the statute of limitations.

IV. Qualified Immunity

The individual defendants Smith, Miller and Shuey also seek dismissal on the basis that their actions were within the scope of those actions protected by the doctrine of qualified immunity.[15] Qualified or "good faith" immunity is an affirmative defense that recognizes that government officials are entitled to some form of immunity from suits for damages. The Supreme Court, in *Harlow v. Fitzgerald*, held that:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of a person of which a reasonable person would have known.

457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). The individual defendants' eligibility for dismissal of this action under the qualified immunity doctrine turns on whether a reasonable person would have known

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[15] The defendants do not assert the qualified immunity defense on behalf of the school district, conceding that the doctrine does not apply to a municipal defendant. Defendants' Brief in Support, p. 19 n. 11 (*citing Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)).

that their conduct violated a clearly established constitutional right.

These same defendants previously have raised the qualified immunity defense before this Court as a basis for granting them summary judgment in *Stoneking v. Bradford Area School Dist.*, another suit brought by a female student at the Bradford high school raising constitutional claims stemming from sexual abuse suffered at the hands of Edward Wright.[16] This Court held that the defendants were not entitled to qualified immunity, concluding that a reasonable person would have been aware that the plaintiff had a substantive due process right to be free from intrusions into her "personal privacy and bodily integrity." *Stoneking*, 667 F. Supp. 1088, 1102 (W.D. Pa. 1987). We stand by that conclusion, and deny the individual defendants' motion to dismiss on the basis of qualified immunity.

ORDER

AND NOW, this 29th day of August, 1988, after careful consideration of the Defendants' Motion to Dis-

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[16] Wright's sexual abuse and harassment of Kathleen Stoneking began in the fall of 1980. The first incident of abuse consisted of Wright forcibly kissing her, and as time progressed the abuse greatly accelerated both in terms of frequency and intrusiveness. The assaults continued on an almost weekly basis until Stoneking's graduation in the spring of 1983. *See Stoneking v. Bradford Area School Dist.*, 667 F. Supp. 1088, 1090 - 1091 (W.D. Pa. 1987).

miss, and for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss is DENIED.

C. Complaint

Sowers v. Bradford Area School District *et al.*
No 88-57 Erie
February 17, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUDY GROVE SOWERS,

Plaintiff

vs No. 88-57

BRADFORD AREA SCHOOL DISTRICT; FREDERICK SMITH, in his individual and official capacity as Principal of Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as Assistant Principal of Bradford Area High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District,

Defendants

COMPLAINT

Parties and Jurisdiction

1. The plaintiff, Judy Grove Sowers (hereinafter "plaintiff"), is a citizen of the Commonwealth of Pennsylvania and resides in Bradford, Pennsylvania.

2. The defendant Bradford Area School District (hereinafter the "School District"), is a local governmental agency organized pursuant to the laws of the Common-

wealth of Pennsylvania with its principal offices located at 50 Congress Street, Bradford, Pennsylvania.

3. The defendant, Frederick Smith (hereinafter "Smith"), is a citizen of the Commonwealth of Pennsylvania, residing in Bradford, Pennsylvania, who is and was at all material times the Principal of the Bradford Area High School.

4. The defendant, Richard Miller (hereinafter "Miller), is a citizen of the Commonwealth of Pennsylvania, who is and was at all material times the Assistant Principal of the Bradford Area High School.

5. The defendant, Frederick Shuey (hereinafter "Shuey"), is a citizen of the Commonwealth of Pennsylvania, residing in Bradford, Pennsylvania, who was at all material times the Superintendent of the School District.

6. This action arises under Title 42 of the United States Code, §1983 and this court has jurisdiction of this action pursuant to Tile 28 of the United States Code, §§1331 and 1343.

Facts

7. In 1976, the School District hired Edward Wright (hereinafter "Wright") to serve as band director.

8. In his capacity as band director, Wright was vested with broad responsibility for conducting and managing the band and music programs of the School District, including the selection of student participants, the scheduling and conducting of practice sessions, including a sum-

mer camp, and scheduling and conducting band competitions and periodic music rehearsals throughout the school year.

9. At all material times, Wright conducted the aforesaid activities with the knowledge, consent and approval of the defendants.

10. During Wright's tenure as band director, the School District's music program greatly improved and the Bradford Area High School Band won numerous competitions, as a result of which Wright enjoyed the strong support and backing of the School District and its officials.

11. The plaintiff graduated from Bradford Area High School in May of 1980 and was a member of the band during her sophomore, junior and senior years.

12. On or about June 16, 1979, the plaintiff was sexually assaulted by Wright.

13. In or about September of 1979, the plaintiff reported the sexual assault to a visiting youth counselor, Gene Dillard, who was lecturing in the School District at the request of the Administration.

14. Subsequent to that conversation, Dillard, personally met with defendants Smith and Miller and a Guidance Counselor whose identity is presently unknown and advised them of the reports of sexual abuse and harassment by Wright and further advised that he considered the reports to be accurate.

15. At or about the same time, and periodically thereafter during the fall and early winter of the school year 1979-1980, the plaintiff met with defendants Smith and Miller and personally informed them of the sexual assault by Wright.

16. During these meetings with the plaintiff, defendants Smith and Miller actively discouraged the plaintiff from pursuing her remedies in court against Wright through intimidation, threats and coercion, and further indicated to the plaintiff for reasons unknown to her at the time, that they did not believe her.

17. In or about January of 1980, defendant Smith required the plaintiff, as a condition of her continued participation in the band, to appear before the assembled high school band for the purpose of issuing a public apology for having accused Wright of the sexual assault.

18. At the band meeting, the defendant Smith opened the floor to questions from plaintiff's fellow students, but the plaintiff did not issue an apology and left the band room in an extremely emotional state.

19. Defendant Shuey was on actual notice of plaintiff's allegation of sexual molestation by Wright and was also aware of and condoned the administrative response thereto.

20. Prior to his employment in the Bradford School District, Wright had attempted to sexually molest

and/or harass various female students while employed as the band director in the Jasper School District.

21. During his tenure in the Bradford School District, Wright had sexually abused and/or harassed other female students in the District both prior and subsequent to assaulting plaintiff.

22. The defendants were on actual or constructive notice that Wright posed a significant threat to the health, safety and welfare of the female student body at Bradford High School in general and the plaintiff in particular prior to June 16, 1979.

Count I

Judy Grove Sowers v. Bradford Area School District

23. Paragraphs 1 through 22 are incorporated herein by reference as if fully set forth.

24. There existed in the Bradford School District a widespread practice, custom and/or policy with the knowledge and acquiescence of administrative personnel, including Smith, Miller, Shuey and the Bradford School Board, of reckless indifference to and/or active concealment of instances of known or suspected sexual abuse of students by teachers.

25. This pernicious practice, custom and/or policy existed prior and subsequent to the assault by Wright of the plaintiff. However, its existence was unknown and unknowable to the plaintiff at the time.

26. In support of the above averment, the plaintiff pleads with particularly the following: (Only the initials of the victims of the sexual abuse and/or harassment are set forth below. The full names of the victims involved will be divulged to the court, in camera, if desired.)

(a) During the school year of 1977-78, a female senior at the Bradford High School, T.R., complained to defendants Smith and Miller that a history teacher and girls' tennis coach, Richard DeMarte, had made improper sexual advances toward her in a classroom. No disciplinary action was taken against DeMarte and the student was told by the defendants not to tell her parents of the incident.;

(b) In or about 1978, and periodically thereafter, defendants Smith, Miller and Shuey received complaints of sexually abusive language and/or improper sexual advances by a Shop Teacher, George Brady. No disciplinary action taken against Mr. Brady and the administrative response was to place a sign on Brady's shop door prohibiting students from congregating there;

(c) As set forth more fully above, the defendants were advised by the plaintiff and Dillard of Wright's sexual molestation of the plaintiff in June of 1979 and had been on notice prior thereto of Wright's proclivity with respect to female students;

(d) On or about January 12, 1981, defendants Smith and Miller were informed by a second female student of Bradford High School, L.T., that Richard DeMarte had kissed her on the neck several times in a classroom. No disciplinary action was taken against DeMarte and the Administration's response was to remove the student from DeMarte's class and issue to him a "no one-on-one" directive;

(e) On or about March 10, 1981, another female student of the Bradford High School, L.L., reported to Smith and Miller that Richard DeMarte had blindfolded her in a classroom, ostensibly to demonstrate the sense of touch, and she observed him on his hand and knees looking up her dress. No disciplinary action was taken against DeMarte and Smith actively intimidated the student from pursuing further action in stating that it was "DeMarte's word against hers" and "Mr. Miller and he would have to judge from that." Another "no one-on-one" directive was issued to DeMarte;

(f) In or about March of 1982, two female students complained to the defendants that Mr. Brady had written sexually suggestive notes and further had asked female students to come into his shop room alone after school. No disciplinary action was taken against Brady;

(g) On or about November 23, 1982, yet a fourth female student at the High School, K.L., complained to defendants Smith and Miller that Richard DeMarte had touched her inappropriately and was attempting to develop a romantic relationship. No disciplinary action was taken against DeMarte;

(h) Commencing in or about June of 1984 and continuing through approximately November of 1984, the defendants were advised by numerous sources, including the parents of A.P., a female basketball player in the High School, that her male coach, Alex Nuzzo, was attempting to develop a romantic relationship with her. Despite numerous complaints, no disciplinary action was taken and Nuzzo was simply issued a written "no one-on-one directive" by defendant Smith with the knowledge and consent of Miller, Shuey and the School Board precluding him from being along with female students;

(i) In or about late September or early October of 1984, a female band member, K.R., informed a guidance counselor that Wright had attempted to sexually molest her in a vehicle. In addition, this student informed the counselor that Wright was presently molesting another student and had molested a student who graduated. This information was relayed to defendant Smith and ultimately defendant Shuey;

(j) On or about December 15, 1984, defendant Smith met with Wright and issued another no one-on-one directive, but informed Wright that "no one had accused him of any wrongdoing;"

(k) In or about October of 1985, the defendants were informed that Richard DeMarte had attempted to sexually assault R.H., a former Bradford High School student, while attending a homecoming celebration. No disciplinary action was taken against DeMarte;

(l) In or about March of 1986, three female Bradford High School students, M.P., J.M., and A.F., complained to defendants that the girls swimming coach had made improper sexual comments. No disciplinary action was taken against Bell;

(m) In or about March of 1986, Wright resigned after public disclosure of his sexual abuse of students but a private psychologist rather than the School District contacted the police an the Child Hot Line..

27. The recklessly indifferent custom, practice and/or policy of the School District consisted of the following:

(a) Failing to report pursuant to the requirements of the Child Protective Services Law, 11 P.S. §2201 et seq., various incidents of suspected

abuse or harassment of female students by Bradford Area High School teachers;

(b) Permitting various teachers to remain in charge of extracurricular student activities, such as the band and girls tennis team, despite knowledge that said teachers presented a danger to the health, safety and welfare of the participants thereof;

(c) Failing to censor, reprimand or take any disciplinary action against various teachers, including Wright, who the defendants knew posed a threat to the health, safety and welfare of the female student population;

(d) Actively concealing reports of sexual abuse of students by teachers and discouraging the victims from pursuing their remedies in court through threats, intimidation and coercion;

(e) Failing to require the monitoring of various teachers' activities despite actual knowledge that they posed a threat to the female population of the Bradford Area School District;

(f) Consistently giving the various teachers set forth above the maximum possible score of their yearly rating forms despite actual knowledge that said teachers had been sexually abusing and/or harassing female students over a several year period;

(g) Failing to adopt, implement and/or follow a proper policy or procedure to insure the identification and reporting of sexual abuse of students by teachers.

28. At all material times, a special custodial relationship existed between the plaintiff as a student and the defendants as administrative personnel of the School District.

29. At all material times, each of the defendants acted under color of state law.

30. The recklessly indifferent custom, practice and/or policy of the School District as set forth above created a climate wherein child abusers, such as Wright, could prey upon female students with impunity.

31. As a proximate result of the aforesaid custom, practice and/or policy of the School District, the plaintiff was deprived of her rights, privileges and immunities secured by the Constitution or Laws of the United States, specifically her liberty interest to be free in her person from sexual abuse guaranteed under the Fourteenth Amendment and her rights under the First and Fourteenth Amendments of free access to the courts impeded by threats, coercion or intimidation.

32. As a further proximate result of the custom, practice and/or policy of the School District, the plaintiff has suffered and will continue to suffer in the future from severe mental anguish, embarrassment, humiliation and emotional distress.

WHEREFORE, the plaintiff, Judy Grove Sowers, requests compensatory damages against the defendant, Bradford School District, in an amount in excess of $10,000.00, plus costs of suit and attorney's fees pursuant to Title 42, U.S.C. §1988.

Count II

(Conspiracy to Violate Plaintiff's Civil Rights Under §1983)

Judy Grove Sowers v. Frederick Smith, Richard Miller and Frederick Shuey

33. The averments in paragraphs 1 through 32 are incorporated herein by reference as if sully set forth.

34. At all material times both prior and subsequent to the assault by Wright of the plaintiff, the individual defendants were members of a conspiracy whose purpose was to conceal from public instances of known and/or suspected sexual abuse of students by various teachers in the Bradford School District, including Wright.

35. This conspiracy was unknown and unknowable to the plaintiff at the time.

36. The overt acts in furtherance of said conspiracy included the individual defendants' consistent failure to respond appropriately to the various complaints of sexual abuse or harassment by teachers, including Wright, as set forth more fully above and in particular the recklessly indifferent fashion in which the defendants addressed the

complaints of the plaintiff against Wright during the school year 1979-80.

37. As further evidence of said conspiracy, defendant Smith maintained a personal, secret file in his desk drawer at home memorializing many of the complaints concerning the teachers set forth more fully above and also the explicit or tacit agreement of each of the co-conspirators to the reckless, willful and wanton administrative response to each complaint.

38. As a proximate result of the aforesaid conspiracy between the individual defendants, the plaintiff was deprived of her rights, privileges and immunities secured by the Constitution or Laws of the United States, specifically her liberty interest to be free in her person from sexual abuse guaranteed under the Fourteenth Amendment and her rights under the First and Fourteenth Amendment of free access to the courts impeded by threats, coercion or intimidation.

39. As a further proximate result of the custom, practice and/or policy of the School District, the plaintiff has suffered and will continue to suffer in the future from severe mental anguish, embarrassment, humiliation and emotional distress.

WHEREFORE, the plaintiff, Judy Grove Sowers, request compensatory damages against the defendants, Frederick Smith, Richard Miller and Frederick Shuey, in an amount in excess of $10,000.00, plus punitive damages,

costs of suit and attorney's fee pursuant to Title 42, U.S.C. §1988.

JURY TRIAL
DEMANDED

Respectfully submitted,

KNOX GRAHAM MCLAUGHLIN
GORNALL AND SENNETT,
INC.

BY: /s/ Wallace J. Knox

/s/Sean J. McLaughlin
Attorneys for Plaintiff
Judy Grove Sowers
120 West Tenth Street
Erie, PA 16501
(814) 459-2800

D. Motion to Dismiss

Sowers v. Bradford Area School District *et al.*
No 88-57 Erie
April 12, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUDY GROVE SOWERS,

Plaintiff

vs C.A. No. 88-57 Erie

BRADFORD AREA SCHOOL DISTRICT;
FREDERICK SMITH, in his individual and official capacity as Principal of Bradford Area High School;
RICHARD MILLER, in his individual and official capacity as Assistant Principal of Bradford Area High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District,

Defendants

MOTION TO DISMISS AND/OR STRIKE

NOW COME DEFENDANTS, by and through their attorneys MURPHY, TAYLOR AND ADAMS, P.C. and ISRAEL AND WOOD and move to dismiss the within Complaint or, in the alternative, strike portions thereof, setting forth as follows:

I. Motion to Dismiss Pursuant to F.R.Civ.P. 12 (b) (6)

1. The Complaint fails to state a claim upon which relief can be granted, for the following reasons:

a. It appears from the face of the Complaint that Plaintiff's injury occurred on June 16, 1979, and no plausible excuse has been pleaded as to why Plaintiff did not bring her action within the limitations period allowed for actions such as these; accordingly, the claim is barred by the statute of limitations.

b. The Defendants were under no duty to protect this Plaintiff from the injury which allegedly occurred to her at the hands of a school teacher.

c. The individual defendants are immune from this action.

d. No action of any Defendant was the "moving force" behind this alleged injury; the Bradford Area School District is therefore not liable.

e. Count Two does not set forth any allegation of illegal conduct by any Defendant.

f. Any state law claims which might be inferred from the allegations of this Complaint are barred by the Pennsylvania Political Subdivision Tort Claims Act.

II. Motion to Strike Pursuant to F.R.Civ.P. 12 (f)

2. Paragraphs 25 and 26 of the Complaint contain immaterial, impertinent and scandalous matters, con-

sisting of allegations of conduct involving teachers other than Ed Wright, students other than Plaintiff, and conduct subsequent to the alleged injury to Plaintiff, all of which has no bearing in any way on the alleged injury to this Plaintiff.

3. Paragraph 20 alleges conduct of Ed Wright which pre-dates his employment with the Defendant Bradford Area School District, but fails to allege that the District ever knew about the said conduct. It is thus immaterial to any cause of action.

Respectfully Submitted,

MURPHY, TAYLOR AND ADAMS, P.C.

By:_____

Kenneth D. Chestek, Esq.
518 State Street
Erie, Pa. 16501
(814) 459-0234

ISRAEL AND WOOD

By:_____

James W. Harvey
501 Grant Building
Pittsburgh, Pa. 15222
(412) 391-1114

E. Excerpts of Transcript of Judy Grove Sowers

Taken September 12, 1986
in the case of *Rovito vs. Bradford Area School District, et al.*, No. 86-133 in the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KIM HARBAUGH and LISA ROVITO, Plaintiffs	)	
v.	)	Civil Action
	)	No. 86-132
BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, In his individual and official capacity as principal of Bradford Area High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of Bradford Area School District, Defendants	)	Erie No. 86-133

* * * * * * * * * * *

Depositions of Judy Grove Sowers, Colleen McDonald Begin, Kathy Rodgers and Kathy Stoneking taken at the offices of Quinn, Gent, Buseck and Leemhuis, Inc., 1400 G. Daniel Baldwin Building, Erie, Pennsylvania on Friday, September 12, 1986 beginning at 9:00 a.m. before Mary F. Hines, court reporter.

Appeared on behalf of the Plaintiffs:

Sean J. McLaughlin, Esquire

Appeared on behalf of the Defendants:

James D. McDonald, Jr., Esquire and

Kenneth D. Chestek, Esquire

describing what happened. We do need to know the facts.

MR. McLAUGHLIN: Judy, you'll have to--I agree with Mr. McDonald, you have an obligation to testify, so do the best you can.

Q. Let me ask you some preliminary questions. You've indicated that the first incident occurred, or an incident occurred on June 16, 1979. You've indicated that this was after the conclusion of school, is that right? After school let out for the year?

A. Yes.

Q. Where did the incident occur?

A. At his house.

Q. All right, and where was his house at that time?

A. North Center Street.

Q. Was there anyone else there that you know of other than you and he?

A. No.

Q. Do you remember what day of the week June 16th was?

A. Saturday.

Q. Do you remember what time of the day you arrived at his house?

A. No.

Q. Do you remember whether it was morning, afternoon or evening?

A. Afternoon.

Q. Do you remember where you had been prior to coming to his house, going to his house?

A. My sister's wedding.

Q. Had he attended the wedding, as well?

A. No.

Q. Whose idea was it for you to go to his house? Yours or his?

A. Mine.

Q. Okay, what was the purpose of going to his home?

A. To pick up a tape of our marching music. I was section leader and I was to learn the music.

Q. Was there any prearrangement that you would pick it up, not necessarily that day, but at any time?

A. No, I was going away the next day fairly early for two weeks, and the day I came back was the day band practice was supposed to start.

Q. How do you know this was June 16, 1979?

A. Because that's the day my sister married.

Q. You relate it to the wedding date, so you're solid on at least the day that it occurred?

A. Yes.

Q. Had you participated in the wedding reception before going?

A. Yes.

Q. Had you been drinking?

A. Yes.

Q. Okay. My only purpose in asking that is to find out how well you recall what went on after that. What, in the best of your recollection, happened from the time you went to the door until the time you left there?

A. I know he was preparing a tape, preparing to tape a tape. It was my understanding it was already made. So I sat down and the only thing I remember was waking up and he was more or less--.

Q. Let me ask some other questions for a moment, Judy. Did you tell him why you were there?

A. He knew, yes.

Q. How did he know?

A. I called him before I left. He knew I was coming.

Q. Before you left the wedding reception?

A. My house.

Q. Would that have been before or after the wedding reception?

A. After the wedding reception.

Q. Had you advised him that you wanted to pick up a tape?

A. Yes.

Q. You said that you sat down because he was

working on a tape, or while he was working on a tape?

A. He said he'd have to tape it, so I sat down and he proceeded to tape the album of our music.

Q. Did he have a device that permitted him to duplicate the tape?

A. Yes.

Q. What did you sit on? A chair, couch?

A. Couch.

Q. Would this have been in any particular room that you recall?

A. Living room.

Q. Did you fall asleep?

A. I believe I passed out, yes.

Q. You just didn't--to your best recollection was it from too much to drink?

A. Yes.

Q. What do you recall after you woke up, or the time that you woke up?

A. He was just all over me.

Q. Were you still on the couch?

A. Yes.

Q. In what position?

A. I suppose I was lying down.

Q. Were you still clothed?

A. Yes.

(3)

Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; RICHARD MILLER, in his individual and official capacity as assistant principal of the Bradford High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

Petitioners,

vs.

JUDY GROVE SOWERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether public school administrators who adopt a practice, custom or policy of deliberate indifference to and active concealment of instances of known or suspected sexual abuse of students by their teachers are entitled to qualified immunity where their conduct results in sexual assaults of students by teachers.

B. Whether public school administrators who deliberately fail to supervise, discipline and control a teacher even though they know or are on actual notice that he presents a significant risk of harm to female students are entitled to qualified immunity where their failure to supervise and control the teacher results in sexual assaults of students by the teacher.

C. Whether public school administrators who conspire to conceal from the public instances of known or suspected sexual abuse of students by various teachers are entitled to qualified immunity where their conspiratorial conduct results in sexual assaults of students by teachers.

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STATEMENT OF CASE

a. Procedural posture and relevant facts.

Judy Grove Sowers ("Respondent" or "Sowers") commenced this action pursuant to 42 U.S.C. Section 1983 (1982) in the United States District Court for the Western District of Pennsylvania, Case No. 88-57, against the Bradford Area School District ("School District"), Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the School District.[1]

Pursuant to Fed.R.Civ.Pro. 12(b)(6), the defendants moved to dismiss Respondent's complaint on the ground, *inter alia*, of qualified immunity.[2] The district court denied the motion. *Sowers v. Bradford Area School District*, 694 F.Supp. 125, 140 (W.D. Pa. 1988), App. at p.46. The individual defendants ("Petitioners") appealed the district court's decision with respect to qualified immunity to the United States Court of Appeals for the Third Circuit, which affirmed by judgment order, without opinion, on January 31, 1989.

In accordance with Fed.R.Civ.Pro. 12(b)(6), the facts material to the district court's decision and the Third

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[1] The individual defendants were sued in both their individual and official capacities.

[2] The Petitioners also moved to strike portions of certain paragraphs of the complaint on the grounds that these paragraphs "contain[ed] immaterial, impertinent and scandalous matters . . ." Motion to Dismiss and/or Strike, p.2, App. at pp.66-67. The district court denied this motion. *Sowers v. Bradford Area School District*, 694 F.Supp.125, 128 (W.D. Pa. 1988), App. at p.15. Only the issue of qualified immunity was immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

Circuit's affirmance were derived primarily from the complaint. App. at pp.11-14. In the district court, the Petitioners appended to their motion to dismiss four of several hundred pages of previous deposition testimony of Respondent taken in three related cases.[3] As explained in more detail below,[4] the district court determined that the materials submitted by Petitioners were irrelevant to the issues presented in their motion to dismiss. App. at pp.25-26.

The gravamen of Respondent's complaint was that the School District, acting through Petitioners, adopted a pernicious practice, custom or policy of deliberate indifference to and active concealment of instances of known or suspected sexual abuse of students by teachers; that this practice, custom or policy created a climate which facilitated and encouraged sexual abuse of students by teachers in general; and that this practice, custom or policy specifically resulted in a sexual assault upon Respondent by the Bradford Area High School band director, Edward Wright ("Wright"). App. at pp.10, 11-14.

During his tenure in the School District, Wright had sexually abused or harassed other female students in the district, both prior and subsequent to assaulting Respondent. App. at pp.11-14. The sexual assault upon Respondent occurred on June 16, 1979; however, the acts and omissions of Petitioners that facilitated Wright's misconduct occurred both before the assault

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[3] Accordingly, Respondent filed a motion in the district court requesting that Petitioners' motion to dismiss be treated as one for summary judgment and disposed of as provided in Rule 56. The district court denied this motion.

[4] See *infra* at pp. 3-5.

and thereafter. *Id.* Further, Petitioners were on actual or constructive notice that Wright posed a significant threat to female students at the Bradford Area High School in general and Respondent in particular prior and subsequent to June 16, 1979. App. at p.11.

Count I of the complaint alleged that Petitioners' conduct created a climate wherein child abusers, such as Wright, could prey upon female students with impunity and that this conduct was a proximate cause of a deprivation of Respondent's constitutional right of freedom from sexual abuse. App. at p.10.

Count II alleged that the individual defendants were members of a conspiracy whose purpose was to conceal from the public instances of known or suspected sexual abuse of students by various teachers. The alleged overt acts in furtherance of the conspiracy included, *inter alia*, the co-conspirators' failure to respond appropriately to complaints of sexual abuse and defendant Smith's keeping of a personal, secret file in his desk drawer at home memorializing many of the complaints against teachers. The alleged proximate results of the conspiracy were the same as those under Count I. App. at pp.10-11.

In their brief, Petitioners emphasize two purported facts in support of their contention that no constitutional duty was violated by them or the School District with respect to Wright's assault on Respondent. First, they note that the "single [assault upon Respondent] occurred off of school property, during summer vacation. . . ." Petitioners' Brief at p.11. While it is clearly Petitioners' intention to portray Respondent's visit to Wright's house as a social call unrelated to any school business, the excerpted portion of Respondent's deposition upon which Petitioners

rely flatly contradicts this. Respondent's deposition reveals that she visited Wright's house for the express purpose of obtaining a tape of marching music for the Bradford High School band. Since she was a section leader in the band and was leaving Bradford the following day for two weeks, it was necessary for her to pick up the music on that day so she could learn it in preparation for summer band practice which was to commence upon her return. App. at pp.25, 73.

More importantly, Petitioners' emphasis of the location of the assault ignores the basis of Respondent's complaint. Petitioners' long-standing custom or practice of deliberate indifference to sexual abuse in the School District and their active concealment of known or suspected sexual abuse of students by teachers created a risk to students that did not stop at the boundary line of school premises. As the district court explained, "[t]he increased threat to female students created by the [Petitioners'] alleged tolerance for sexual abuse was not the sort of danger that disappeared when those students packed up their instruments and walked out of the band room." *Sowers v. Bradford Area School District*, 694 F.Supp. at 132, App. at p.25. Petitioners knew that Wright was a threat to students but they nevertheless continued to hold him out to students as the school sanctioned band director. They were also fully cognizant that Wright's band-related duties continued throughout the summer months and that students periodically would come in contact with Wright in conjunction with band-related activities off school premises during the summer months. *Id.* Accordingly, Respondent contends that the location of Wright's assault has no relevance to

whether Petitioners' conduct was such that they can be held accountable for the constitutional violation perpetrated by Wright.

Respondent also submits that the number of assaults upon her is similarly irrelevant. That Petitioners' tolerance and concealment of sexual abuse of students by teachers facilitated a single assault is sufficient at this stage of the proceedings to establish the nexus between their deliberate indifference and active concealment and the deprivation of Respondent's constitutionally protected rights.

Petitioners also contend that the record in the instant case includes "*no evidence* that the School District had notice of any sort prior to the alleged incident that Wright was a threat to any person." Petitioners' Brief at p.11 (emphasis supplied). This contention, which Petitioners raised for the first time on appeal, simply misstates the record. Respondent's complaint alleged, among other things, that Petitioners were on actual or constructive notice that Wright posed a threat to female band members prior to his assault on Respondent. Complaint ¶22, App. at p.53. The motion to dismiss filed by Petitioners in the district court challenged the legal sufficiency of Respondent's complaint asserting that, even accepting her allegations as true, Petitioners owed her no duty and were, therefore, protected by qualified immunity. In an effort to represent this case as an expansion of the scope of Section 1983 liability and exaggerate its consequences, Petitioners have attempted to alter the factual record underlying the district court's decision.[5] Thus, in determining whether to grant

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[5] This alteration of the record is further evidenced by com-

certiorari in this case, the Court must first decide whether it would review the decision of the district court based upon the record below or based upon the record presented in Petitioners' brief.[6]

b. Relationship to *Stoneking v. Bradford Area School District*.

The district court and court of appeals both held that the instant case does not involve facts materially different from those at issue in *Stoneking v. Bradford Area School District*, 856 F.2d 549 (3d Cir. 1988). On March 6, 1989, this Court vacated the judgment in *Stoneking* and remanded the case to the United States Court of Appeals for the Third Circuit for further consideration in light of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. ___ (1989). *DeShaney* involved claims against a government body based on its inaction in the face of private violence. The instant case involves acts of violence perpetrated by a state actor in accordance with policies, practices and customs of his superiors. Respondent submits that, unlike the claims in *DeShaney*, Respondent's claims against Petitioners and the School District in this case and *Stoneking* rest upon well-established principles of municipal and supervisory liability under 42 U.S.C. Section 1983.

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paring Petitioners' brief at p.24, n.11 with the complaint at ¶¶13-22, App. at pp.51-53.

[6] Petitioners also note that prior to the assault, Respondent had been drinking at her sister's wedding reception. However, they fail to explain what possible significance this fact has on the issue of whether Petitioners' acts and omissions were a moving force behind the violation of her constitutional rights. Certainly, Respondent did not shed her constitutional rights by consuming alcoholic beverages at her sister's wedding reception.

ARGUMENT

a. Summary of Argument.

In *DeShaney v. Winnebago County Department of Social Services*, No. 87-154, slip op. (U.S. Feb. 22, 1989), the Court held that a State's failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause of the Fourteenth Amendment because the Due Process Clause imposes no duty on the State to provide members of the general public with adequate protective services. Unlike the petitioner's claim in *DeShaney*, however, Respondent's complaint against Petitioners and the School District in this case is not based on a general "affirmative right to government aid." Slip Op. at 6. Rather, the gravamen of Respondent's claim against Petitioners and the School District is three-fold: first, that they affirmatively adopted a practice, custom or policy of deliberate indifference to and active concealment of instances of known or suspected sexual abuse of students by teachers over whom Petitioners exercised supervisory authority; second, that they purposefully and recklessly failed to supervise, control, discipline or discharge Wright when they knew or were on actual notice that he presented a significant threat to Respondent and other female students; and third, that Petitioners conspired to conceal from the public instances of known or suspected sexual abuse of students by various teachers, including Wright. Respondent submits that this conduct proximately resulted in Wright's assault upon her.

Unlike the Department of Social Services in *DeShaney*, Petitioners exercised direct supervisory authority over the perpetrator of the assault, who was

himself a state actor. In this case, Petitioners' own conduct was a catalyst of the violation of Respondent's constitutionally protected right to be free from sexual abuse. By 1979, reasonable school administrators would have understood that they could not engage in affirmative policy-making and conspiratorial action which sanctioned such abuse of students by teachers.

b. *DeShaney v. Winnebago County Department Of Social Services* does not control this case.

DeShaney arose out of a State's failure to intervene and protect a small boy, Joshua DeShaney, who had been beaten and permanently injured by his father, with whom he had lived. Joshua DeShaney's guardian ad litem commenced an action in federal court pursuant to 42 U.S.C. Section 1983 against certain social workers and other local officials who had received complaints that Joshua was being abused by his father, but who nonetheless had not acted to remove the boy from his father's custody. The plaintiff claimed that the defendants' failure to act had deprived Joshua DeShaney of his liberty in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Court rejected this argument, holding that "a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Slip Op. at 7.

Of the multiple distinctions between *DeShaney* and this case the status of the abuser and the abuser's relationship to the government body is most important. In *DeShaney*, "the State [had] played no part in creating" the danger to Joshua DeShaney. *Id.* No link existed between the defendants and the abuse of Joshua. Joshua had suffered his tragic fate at the

hands of his father, "who was in no sense a state actor." *Id.* at 11 (footnote omitted). However, in the instant case, the abuser was a state actor whose assault of Respondent was facilitated by his status as director of the Bradford Area High School band.

The significance of this distinction is best-illustrated by considering whether the Court would have reached the same result in *DeShaney* if the relationship between the abuser and the supervisory officials had been as it is in this case. In other words, would the defendants in *DeShaney* have been entitled to dismissal of Joshua DeShaney's complaint if they had adopted a custom, practice or policy of tolerating abuse of children by their subordinates and actively conspired to conceal such abuse? Would the Court have affirmed the dismissal of Joshua DeShaney's claim if the perpetrator of his abuse had been a social worker, rather than Joshua's father, and if the Department of Social Services officials had known or been on actual notice that the social worker was a threat to the children she encountered as part of her job but had deliberately disregarded this knowledge and taken no action to control the social worker? Based upon the Court's rationale set forth in the *DeShaney* opinion and earlier decisions of the Court,[7] Respondent believes that the Court would have answered these questions in the negative.

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[7] See *infra* at p. 11.

c. School students have a constitutionally protected liberty interest in being free from sexual abuse by teachers and school officials have a corresponding constitutional duty not to pursue a custom, practice or policy that sanctions deprivations of that interest by teachers.

The liberty interest in being free from physical abuse in school was established no later than 1977, when this Court held in *Ingraham v. Wright* that "corporal punishment in public school implicates a constitutionally protected liberty interest." 430 U.S. 651, 672 (1977). This principle has since been uniformly recognized by the federal courts of appeals that have addressed the issue. *See e.g., Hall v. Tawney*, 621 F.2d 607, 613 (4thCir. 1980); *Garcia v. Miera*, 817 F.2d 650, 656-58 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988).

Both the district court below and the Third Circuit in *Stoneking* held that a student's interest in personal bodily integrity encompasses more than freedom from excessive corporal punishment. The Third Circuit in *Stoneking* noted that "common sense suggests that the right to be free from sexual abuse is at least as fundamental as the right to be free from the less intrusive physical abuse of paddling." *Stoneking*, 856 F.2d at 599.

This conclusion is not genuinely disputed even by Petitioners. Instead, they assert that school administrators do not have a "clearly established" affirmative duty to take steps to protect school children from sexual abuse by a staff member. For this proposition, Petitioners rely principally on *Martinez v. California*, 444 U.S. 277 (1981), where the Court held that members of a parole board were not liable under Section 1983 for damages caused when a convict they

had paroled murdered the plaintiff's decedent. However, *Martinez* does not apply in the instant case because, as in *DeShaney*, the perpetrator of the attack in *Martinez* was a third person unrelated to the defendant government body. In *Martinez*, the Court specifically noted that the parolee was "in no sense an agent of the parole board." *Id.* at 285.

In contrast, Wright was an agent of the School District and, at all relevant times, Petitioners exercised supervisory authority over him. The basis for Respondent's claim against Petitioners is not that they failed to rescue or protect her from a dangerous third person unrelated to the School District. Nor is it Respondent's claim that Petitioners are liable to her under a theory of respondeat superior. Rather, Respondent's position is that Petitioners' tolerance and tacit encouragement of sexual misconduct by teachers in general and knowing disregard of the threat posed by Wright in particular created the danger to Respondent and other students. This is not, as Petitioners contend, a novel or expansive basis for liability under Section 1983.

By 1978, it was well-established that a government body could be liable under Section 1983 for the conduct of a lower echelon employee where the employee acted in accordance with governmental "policy" or "custom." *See Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Similarly, in 1976, the Court recognized that government officials charged with supervisory authority could be held liable under Section 1983 where an "affirmative link" existed between the supervisors' own actions and the misconduct of their subordinates. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). *See also, Kentucky v. Graham*,

473 U.S. 159, 166 (1985) ("[T]o establish personal liability in a Section 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.").

Numerous federal courts of appeals have held that government officials with supervisory responsibility may not adopt or promote policies that authorize or condone constitutional deprivations by their subordinates. *See e.g., McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391 (7th Cir. 1984) (police supervisor's negligent selection, supervision or failure to discharge subordinates causally related to their wrongdoing is grounds for liability under Section 1983); *McClelland v. Facteau*, 610 F.2d 693, 697 (10th Cir. 1979) (police chiefs have a duty to correct subordinate misconduct of which they have notice); *Sims v. Adams*, 537 F.2d 829, 831-32 (5th Cir. 1976) (complaint stated cause of action against mayor and chief of police for breach of their duties to control police officer's known propensity for improper use of force); *Fiacco v. City of Rensselar*, 783 F.2d 319 (2d Cir. 1986) (deliberate indifference to misconduct of subordinates is a basis for liability under Section 1983), *cert. denied*, 480 U.S. 922 (1987); *Doe v. New York Department of Social Services*, 649 F.2d 134, 144-42 (2d Cir. 1981) (foster care officials' failure to supervise subordinates may demonstrate reckless indifference to the rights of foster children giving rise to Section 1983 liability); *Duchesne v. Sugarman*, 566 F.2d 817, 822 (2d Cir. 1977) ("Where conduct of the supervisory authority is directly related to a denial of a constitutional right, it is not to be distinguished as a matter of causation, upon whether it was action or inaction"); *Williams v.. Smith*, 781 F.2d 319, 323 (2d Cir. 1986) ("A su-

pervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue").

The question in this case is whether an affirmative link exists between the conduct, customs and policies of Petitioners and the School District on the one hand and the misconduct of Wright on the other. Petitioners' defense is not that the existence of such an affirmative link would not support liability; it is that they did not sanction, approve or ratify Wright's misconduct. Petitioners' Brief at p.24, n.11. However, this purely factual challenge, which was not raised in the district court, flies in the face of Respondent's complaint.

Moreover, "[t]he issue of authorization, approval or encouragement is generally one of fact, not law." *Turpin v. Mailet*, 619 F.2d 196, 201 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980). Further, a complaint should not be dismissed unless it "appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Petitioners' Petition for Writ of Certiorari seeks not a clarification of unsettled law but an adjudication of the facts of this case. Respondent submits that such relief is inappropriate in the United States Supreme Court.

d. Custody or its equivalent is unnecessary where a state actor violates constitutionally protected rights in accordance with state custom, practice or policy or where state officials actively conspire to conceal constitutional violations perpetrated by their subordinates.

Under *DeShaney*, custody of the victim or its equivalent is necessary before the State will be required

as a matter of constitutional law to provide affirmative protection from private violence. This case, however, is not predicated on state inaction, but on affirmative intrusions by a state actor into constitutionally protected rights. State custody has never been required where the constitutional tort is committed by a state actor. Although Petitioners and the School District cannot be held vicariously responsible for Wright's actions under a theory of respondeat superior, they can be held accountable under theories of supervisory and municipal liability. The School District can be held accountable for Wright's misconduct if it was committed pursuant to or in accordance with School District custom or policy. *See Monell v. Department of Social Services, supra*, at p. 11. Petitioners can be liable for Wright's actions if an affirmative link exists between his actions and their own conduct. *See Rizzo v. Goode, supra*, at p.11.

These questions of supervisory and municipal liability are separate and distinct from the issue raised by Petitioners in the district court and in the court of appeals. Petitioners argued that they cannot be liable to Respondent because they had no duty to protect her. While this contention arguably might have been meritorious if Respondent had been assaulted by a third party unrelated to the School District and Petitioners, it misstates the duties of the respective state officials in a case such as this, where the assault was committed by a state actor in accordance with a custom, practice or policy of his superiors. The Due Process Clause imposes a duty on the state and its officers not to intrude on the personal bodily security of individuals. Wright breached this duty when he sexually assaulted Respondent. In turn, the duties of

supervisory officials include a duty not to expressly or tacitly sanction or encourage unconstitutional conduct by their subordinates and a duty not to conspire to conceal unconstitutional conduct by their subordinates. Petitioners breached these duties when they acted as alleged in Respondent's complaint.

e. Petitioners are not entitled to qualified immunity.

Government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, ___U.S. ___ , 107 S.Ct. 3034, 3039 (1987). Consistent with this principle, the Third Circuit requires "some but not precise correspondence" with applicable precedents, and demands that "officials apply, well developed legal principles." *Stoneking*, 856 F.2d at 599 (*quoting People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 139, 144 (3d Cir. 1984)). *See also, Prisco v. United States Department of Justice*, 851 F.2d 93, 96-97 (3d Cir. 1988); *Kovats v. Rutgers*, 822 F.2d 1303, 1313 (3d Cir. 1987).

By 1979, the constitutional right of freedom from state intrusions into personal bodily security was clearly established, as were the principles governing supervisory liability and municipal liability based on constitutionally infirm customs and policies.

Among the "historic" liberties protected by the Due Process Clause of the Fourteenth Amendment is "a right to be free from and to obtain judicial relief, for

unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. at 673 (footnote omitted). *Ingraham* was a procedural due process case in which the Court concluded that "corporal punishment in public schools implicates a constitutionally protected liberty interest . . .". *Id.* at 674. *Ingraham* is significant here because it illustrates that the constitutionally protected right of personal bodily security has applied, at least since 1977, in schools as well as jail houses.[8]

By 1979, it was similarly well-established that government officials could not, with impunity, adopt or promote policies that authorize or condone constitutional deprivations by their subordinates.[9] Although originally set forth in cases involving different factual settings, this simple principle was clearly applicable to and understandable by all government officials. As the Court emphasized in *Anderson v. Creighton*, ___U.S. ___, 107 S.Ct. at 3039, it is not the case that "an official action is protected by official immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent." By 1979, Petitioners required neither clairvoyance nor the advice of a constitutional scholar to apprise them that their deliberate indifference to and concealment

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[8] However, unlike corporal punishment which "dates back to the colonial period," *Ingraham*, 430 U.S. at 660, and which, when properly administered, may further legitimate educational purposes, sexual abuse at the hands of a state actor is inherently repugnant to an individual's right to be free of state intrusions into realms of bodily security. It is probably safe to say that no pre-deprivation procedural safeguards would be sufficient to allow such conduct.

[9] See *supra* at pp. 11-12.

of sexual abuse of students by teachers were unlawful.

f. This case does not make school administrators guarantors of the safety of students.

Petitioners have repeatedly misstated the record in this case by claiming that "[t]here is no allegation that the sexual contact with Edward Wright was sanctioned, approved or ratified by Smith, Miller and Shuey." Petitioners' Brief at p.24, n.11. Unlike the hypothetical school district and school administrators described in Petitioners' brief, Petitioners were not oblivious to the gross misconduct of Wright and other teachers. The record in this case is that Petitioners knew or were on actual notice that Wright posed a significant threat to female students prior to his assault on Judy Sowers. Complaint at ¶¶9,21-22, App. at pp.53, 55. Both before and after Wright's assault, Petitioners engaged in a pattern of conduct which sanctioned and tacitly encouraged sexual abuse of students by teachers. Complaint ¶¶13-22, 26(a)-(m), 27(a)-(g), App. at pp.51-59. When apprised by Sowers and others of the specific assaults by Wright, the record demonstrates, Petitioners reprimanded, humiliated and intimidated the victims but took no action to control Wright. Complaint at ¶¶13-19, App. at pp.51-52.

Contrary to Petitioners' protests, the decision in this case does not place school districts and their administrators in the position of guarantors of the safety of their students. As stated above, Respondent's complaint against Petitioners and the School District is not that they failed to protect her from a dangerous third person unrelated to the School District. It is that they affirmatively adopted a prac-

tice, custom or policy of deliberate indifference to and active concealment of instances of known or suspected sexual abuse of students by teachers over whom Petitioners exercised supervisory authority; that they recklessly failed to supervise and control Wright when they knew or were on actual notice that he presented a significant threat to Respondent and other female students; and that Petitioners conspired to conceal from the public instances of known and/or suspected abuse of students by various teachers. Holding that such conduct falls within the proscriptions of the Due Process Clause of the Fourteenth Amendment does not place school administrators in the position of guarantors of the safety of students. It merely reaffirms their accountability for such conduct where it results in violations of the constitutionally protected rights of the students who they are intended to serve.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 88-1350

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

JUDY GROVE SOWERS

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

The Respondent, Judy Grove Sowers (hereinafter "Sowers"), has included in her Brief in Opposition to Petition for Writ of Certiorari a number of misstatements of fact and law that distort Petitioners' arguments. Petitioners take this opportunity to redirect this Court's attention to the real issue presented in this case: whether Petitioners Smith, Miller and Shuey are immune from suit under the facts alleged by Sowers in this case.

In reviewing the issue of qualified immunity, this Court should be aware of an intervening development. On March 6, 1989, this Court granted a writ of certiorari, and vacated and remanded the judgment of the Third Circuit in a companion case in which these same Petitioners appealed the denial of the defense of qualified immunity. *Smith v. Stoneking*, No. 88-802 (U.S. March 6, 1989), 1989 U.S. LEXIS 1232. This Court's order was entered in light of its decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. , 57 U.S.L.W. 4218 (February 22, 1989). This appeal presents an even more compelling case for a grant of certiorari.

II. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI IN LIGHT OF *DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*

This Court should grant certiorari in light of the recent decision of *DeShaney v. Winnebago County*

Department of Social Services, supra. In that decision, this Court ruled that a municipality and its employees may not be held liable, under 42 U.S. §1983, for failing to protect an individual at liberty from abuse. In reaching this conclusion, this Court expressly rejected the rationale used by the Third Circuit in imposing liability under a similar fact pattern in *Estate of Bailey by Oare v. County of York*, 768 F.2d 503 (3d Cir. 1985). *Id.* at 4220.

This Court's decision in *DeShaney*, with its concurrent rejection of the rationale used in *Estate of Bailey by Oare*, has great significance for the instant appeal. In denying Petitioners' claim of entitlement to the defense of qualified immunity, the Third Circuit relied on its recent decision in *Stoneking v. Bradford Area School District*, 856 F.2d 594, 600-01 (3d Cir. 1988), *cert. granted, judgment vacated and remanded sub nom. Smith v. Stoneking*, No. 88-802 (U.S. March 6, 1989). *Sowers v. Bradford Area School District*, No. 88-3640 (3d Cir. January 31, 1989), 1989 U.S. App. LEXIS 924. In *Stoneking*, the Third Circuit incorporated and applied its now-rejected *Estate of Bailey by Oare* rationale in determining that Petitioners were not entitled to assert the defense of qualified immunity. Because this Court has now expressly rejected the rationale used by the Third Circuit in denying Petitioners' appeal, this Court should grant certiorari and reverse the judgment of the court below.

The decision by this Court in *DeShaney* serves to underscore Petitioners' argument that no clearly established law existed in 1979 that imposed a constitutional duty upon

Petitioners to protect public school students enrolled in the Bradford Area School District. In determining whether or not a public official is entitled to a defense of qualified immunity, one must identify legal principles governing analogous factual situations at the time the alleged constitutional violation occurred, and if any existed, determine whether the public official should have related this established law to the situation before them. *Hicks v. Feeney*, 770 F.2d 375, 380 (3d Cir. 1985).

DeShaney represents the factual situation that is most analogous to the present case. *DeShaney* involved a state agency's failure to protect a minor at liberty from physical abuse, the gravamen of Respondent's claim herein. Petitioners have previously argued that no clearly established constitutional duty to protect a public school student existed in 1979; this Court's 1989 decision in *DeShaney* confirms Petitioners' contention.

III. UNDER *DESHANEY*, NO CONSTITUTIONAL DUTY OF PROTECTION WAS OWED TO SOWERS BECAUSE SHE WAS AT LIBERTY

The judgment of the Third Circuit in this case conflicts with this Court's decision in *DeShaney* and *Stoneking* and should be reversed. Despite the hyperbolic argument in Respondent's Brief in Opposition to Petition for Writ of Certiorari, the gravamen of Sowers' Complaint is an alleged failure of the Petitioners to protect her from a criminal assault by a teacher, committed during summer vacation when she was voluntarily present in the teacher's

home, when the district had no knowledge of the criminal activity or the fact that Sowers, in particular, was at risk.[1] Indeed, Sowers readily admits that the incident occurred during summer vacation, and in a teacher's private home. Respondent's Brief, pp. 3-4.

The rationale of *DeShaney* cannot lead to any conclusion other than that Petitioners may not be sued, under §1983, for the alleged incident of sexual abuse that occurred during the summer of 1979. In *DeShaney*, this Court established the parameters for governmental liability in the context of an alleged substantive due process violation:

> When a state by an affirmative exercise of its powers so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e.g.*, food,

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[1]Paragraph 36 of Respondent's Complaint sets forth Sowers' claims against Petitioners. In this paragraph, Sowers alleges that "defendants' consistent failure to respond appropriately to various complaints of sexual abuse or harassment by teachers . . . [and] in particular the recklessly indifferent fashion in which the defendants addressed the complaints of the plaintiff . . ." resulted in an allegedly unconstitutional deprivation of her 14th Amendment liberty interest. App., p. 60-61. Thus, Sowers does not claim that Petitioners touched or abused her in any way; a plain reading of Respondent's complaint reveals that her claim is based solely upon a duty to protect theory.

Even under this theory of liability, Petitioners are at a loss to comprehend how their alleged failure to repond to Sowers' complaints resulted in her injury, since her complaints concerning Wright were made *subsequent* to the incident.

> clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the due process clause. . . . The affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. . . . *In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protection of the due process clause, not its failure to act to protect his liberty interest against harms inflicted by other means.*

DeShaney, 57 U.S.L.W. at 4220-21 [emphasis added][citations omitted].

This holding, imposing liability only when the state affirmatively and completely restrains an individual's liberty, is particularly illustrative of the error made by the Third Circuit in determining that Petitioners owed a constitutional duty of protection to Sowers. Certainly, Sowers was not in the custody of the school district or its administrators at the

time of the alleged incident[2], nor did the school district or its administrators affirmatively restrain Respondent's freedom to act on her own behalf.

Indeed, this Court has previously indicated that public school setting is qualitatively different from the incarceration or institutionalization setting emphasized in *DeShaney*:

> Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving during school hours; and at the end of the school day, the child is invariably free to return home.

Ingraham v. Wright, 430 U.S. 651, 670 (1977).

It must be remembered that, in making this analysis, this Court was commenting on the in-school environment in which public school students are placed. Sowers, at the time of the alleged incident, was not even subject to the minimal restraints on liberty that are found in the public school setting. In fact, she was constrained, if at all, by

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[2]Sowers, during her summer school vacation, was in the legal custody of her parents at the time of the incident of which she complains. Further, Sowers does not allege that the school district and Petitioners committed any affirmative act that restrained her liberty at the time the incident allegedly occurred. She was not incarcerated or institutionalized; nor was she subject to the *in loco parentis* authority that the school district and its administrators possess during school hours. Sowers was indeed free from any affirmative state restraint on her liberty, as are all teenagers who do not attend school during summer vacation.

only those restrictions placed upon her by her parents. She was completely free from any state restraint on her liberty, and Petitioners owed her no affirmative constitutional duty of protection.

Sowers, however, asserts that *DeShaney* is not controlling, because the alleged sexual abuse to which she was subjected was committed by a teacher, Edward Wright. Respondent's Brief, p.11. However, for purposes of analyzing Sowers' claim, Petitioners submit that the Wright was, in functional terms, a private citizen at the time of the incident. *See Delcambre v. Delcambre*, 635 F.2d 407 (5th Cir. 1981) (on-duty policeman, involved in purely private altercation, does not act under color of state law). Despite Sowers' protests to the contrary, Wright was not acting as an agent of the district at the time of the alleged assault; any acts that he may have committed were not related, in any conceivable way, to his employment as a school district teacher. He was not charged with any formal teaching duties, and the alleged incident occurred during summer vacation, and in his private home.[3]

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[3] Respondent's reference to Wright as an "agent" of the school district confirms Sowers' continued pursuit of a *de facto* claim of *respondeat superior* liability against it and Petitioners in this case. Such a theory is contrary to accepted law; a municipal government cannot be liable under § 1983 on a *respondeat superior* theory of liability. *See Monell v. New York City Department of Social Services*, 436 U.S. 658 at 691 (1978); *see also City of Canton v. Harris*, 57 U.S.L.W. 4270 (February 28, 1989), 1[illegible] U.S. LEXIS 1200.

Petitioners owed no constitutional duty of protection to Sowers. They are entitled to assert the defense of qualified immunity, and be dismissed from this proceeding.

IV. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed in the Petition.

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V. PROOF OF SERVICE

I hereby certify that three copies of the within Petitioners' Reply Brief in Support of Petition for Writ of Certiorari were served on Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 30th day of March, 1989.

Kenneth D. Chestek

Kenneth D. Chestek, Esq.